Supreme Court
FILED
041737 MAY 26 2005
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

COAST AUTOMOTIVE GROUP LTD.,

Petitioner,

v.

VOLKSWAGEN CREDIT, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

GEOFFREY J. HILL, ESQ.
N.U.S. Corporate Plaza
1 Maynard Drive, Suite 6
Park Ridge, NJ 07656
(201) 505-1033
Attorney for Petitioner

Wright Appellate Services 0520
(215) 733-9870 • (800) 507-9020 • Fax (215) 733-9872

QUESTIONS PRESENTED

1. Whether the Third Circuit improperly disregarded the precedent of *VW Credit v. Coast Automotive Group, Ltd, et. al., VOA and AOA, et. al.*, 346 N.J. Super. 326, 787 A. 2d 951 (App. Div. 2002), certif. denied 172 N.J. 178 (2002) in which the Superior Court, Appellate Division, held that Coast was eligible for relief under the New Jersey Franchise Practices Act?

2. The New Jersey Franchise Practices Act being grounded in common law contract law, is there a difference between a "termination" claim"(for which "good faith" is generally irrelevant) and a "non-termination" claim under The New Jersey Franchise Practices Act(where issues of "good faith performance by a franchisor", "waiver of alleged defaults by a franchisor", and a "failure to terminate by a franchisor" may all be factors)?

3. Whether the Federal Courts recognize The New Jersey Franchise Practices Act as an enhancement of common law protections available to franchisees, or something less than that, as held by the Third Circuit in this matter?

4. Whether, on Count 18 of Coast's complaint (Coast's claim under the N.J.S.A. §56:10-7(e)), it was legal error and a misstatement of the law for the jury to have been charged on N.J.S.A. §56:10-9 and for the Verdict Sheet Question 6 to have been given?

5. Whether, on Count 18 of Coast's complaint (Coast's claim under the N.J.S.A. §56:10-7(e)), it was legal error and a misstatement of the law for the jury to have been charged

on N.J.S.A. §56:10-9 and for the Verdict Sheet Question 6 to have been given, particularly where VOA and AOA had stipulated (55a) they did not attempt to terminate the contractual franchise relationship during the relevant period and where, as a matter of law, VOA and AOA were required to do business with Coast because of the "Automatic Stay Doctrine" imposed by Coast's Chapter 11 proceeding.?

6. Whether the instruction under N.J.S.A. §56:10-9 and Verdict Sheet Question 6 were erroneous because there was no factual relationship drawn between Coast's affirmative allocation claims and the alleged substantial non-compliance?

7. Whether as a matter of New Jersey law, Coast's method of purchasing vehicles was substantially compliant and, thus, the instruction under N.J.S.A. §56:10-9 was in error as a matter of law?

8. Whether the district court erred in giving an instruction and verdict sheet question under N.J.S.A. §56:10-9 since Coast was a franchisee with all of its rights intact?

9. Whether, even if an instruction and verdict sheet question under N.J.S.A. §56:10-9 were permissible on Count 18 of Coast's complaint, the substantial and credible weight of evidence did not support a finding against Coast on verdict sheet question 6?

10. Whether, as to Count 17 of plaintiff's complaint, the jury's finding on verdict sheet question 2 was against the substantial weight of the credible evidence of the record?

11. Whether it was error for Coast to be prohibited from offering testimony as to the actions of VW Credit employees as to the coercive and intimidating atmosphere relative to Count 17 of plaintiff's complaint?

TABLE OF CONTENTS

Page

Questions Presented For Review i

Table Of Contents iv

Table Of Authorities vi

Statement of Jurisdiction 1

Statement of Case 1

Legal Argument for Allowance of Petition 4

I. The Third Circuit Improperly Disregarded the Precedent of VW Credit v. Coast Automotive Group, Ltd., et al v. VOA and AOA, et al, 346 N.J. Super 326, 787 A.2d 951 (App. Div. 2002), *certif.. denied*, 172 N.J. 178 (2002) 4

II. This Court Should Settle the Important Question of Whether or Not Judicial Enhancements Pursuant to the United States Sentencing Guidelines Constitute a Denial of the Sixth Amendment Right to Trial by Jury 13

III. The Most Glaring Error In The Third Circuit's Decision Is That During The Same Period, In The State Court, Coast Obtained A Judgment Against VOA and AOA Under the New Jersey Franchise Practices Act, Showing As A Matter Of Law, That Coast Was Eligible For Relief Under The New Jersey Franchise Practices Act

Irrespective of VOA's and AOA's Contentions Of Alleged Non-Compliance..... 18

IV. Even If An Instruction And Verdict Sheet Question Under N.J.S.A. § 56:10-9 Were Permissible On Count 18 of Coast's Complaint, The Substantial And Credible Weight Of Evidence Did Not Support A Finding Against Coast..... 21

V. As To Count 17 Of Plaintiff's Complaint, The Jury's Finding On Verdict Sheet Question 2 Was Against The Substantial Weight of the Credible Evidence of the Record..... 28

Conclusion 30

TABLE OF AUTHORITIES

Page

Cases:

Amerada Hess Corp. v. Quinn, 143 N.J. Super. 237, 253 (1976) 15

Carlo C. Gelardi v. Miller Brewing Company, 502 F.Supp. 637, 653 (D.N.J. 1980) 14

Coast Automotive Group, Ltd. v. VW Credit, Inc., 34 Fed. Appx. 818, 2002 WL 121932 (3rd Cir. (N.J.)) ..... *passim*

General Motors v. The New A.C. Chevrolet, 263 F.3d 296 (2001) 15,16,29

Stamato v. Borough of Lodi, 4 N.J. 14, 21 (1950) 6,15,16

State v. International Fed'n of Prof'l and Technical Engrs., 780 A.2d 525 (2001) 12

Westfield Centre Service, Inc. v. Cities Service Oil Co., 432 A.2d 48, 55 (N.J. 1981) 10

Statues:

28 U.S.C. § 1254(1) 1

N.J.S.A. § 56:10-5 10

N.J.S.A. § 56:10-6 8

N.J.S.A. § 56:10-7(e) ..... *passim*

N.J.S.A. § 56:10-9 ..... *passim*

APPENDIX

	Page
Appendix A – Order Denying Petition for Rehearing En Banc, filed February 25, 2005	1a
Appendix B – Judgment, filed January 25, 2005	3a
Appendix C – Opinion of the Court, filed January 25, 2005	5a
Appendix D – Notice of Appeal, filed February 25, 2003	18a
Appendix E – Order, filed January 8, 2003	20a
Appendix F – Order of Judgment, filed December 15, 2002	23a
Appendix G – Judgment, filed October 30, 2002	26a
Appendix H – Jury Verdict Sheet, filed September 12, 2001	28a
Appendix I – Order, filed November 8, 2001	32a
Appendix J – Transcript of Telephone Conference, dated April 5, 1999	34a
Appendix K – Plaintiff's Proposed Jury Instruction No. 12	36a
Appendix L – Plaintiff's Proposed Jury Instruction No. 13	37a
Appendix M – Plaintiff's Proposed Jury Instruction No. 14	38a

Appendix N – Plaintiff's Proposed Jury Instruction No. 12 ..... 41a

Appendix O – Plaintiff's Proposed Jury Instruction No. 13 ..... 42a

Appendix P – Letter to Honorable Garrett E. Brown, U.S.D.J. From Geoffrey Hill, dated September 9, 2001 ..... 43a

Appendix Q – Letter (Continued) to Honorable Garrett E. Brown, U.S.D.J. from Geoffrey Hill, dated September 9, 2001 ..... 45a

Appendix R – Transcript of Trial, dated September 5, 2001 ..... 47a

Appendix S – Transcript of Trial, dated September 10, 2001 ..... 49a

Appendix T – Transcript of Trial, dated September 11, 2001 ..... 51a

Appendix U – Transcript of Trial, dated September 12, 2001 ..... 53a

Appendix V – Transcript of Trial, dated September 4, 2001 ..... 60a

STATEMENT OF JURISDICTION

Petitioner Coast Automotive Group, Ltd. respectfully submits that pursuant to 28 U.S.C. §1254 (1) jurisdiction exists for this Court to hear this petition for a *writ of certiorari*. On February 25, 2005, the United States Court of Appeals for the Third Circuit entered an Order denying the motion for rehearing of Coast Automotive Group, Ltd. of the January 25, 2005 Judgment of the Third Circuit. The January 25, 2005 Judgment affirmed the October 30, 2002 judgment became final on January 8, 2003 and from which Coast Automotive Group, Ltd. filed a timely appeal.

STATEMENT OF CASE

On December 12, 1995, VW Credit filed an Order to Show Cause with Temporary Restraints in the Superior Court of New Jersey, Ocean County, Chancery Division, against Coast (and other related parties) alleging that Coast took too many days to repay VW Credit on principal advances on Coast's new vehicle floor-plan line of credit. VW Credit called Coast into default and accelerated the $6 million in floor-plan financing through which Coast had purchased its new vehicle inventory since 1991.

On December 15, 1995, Coast filed a voluntary petition for Chapter 11 Reorganization in what was essentially a single-creditor case. On January 21, 1997, Coast, not a part of the state court litigation by virtue of its Chapter 11 filing, filed an adversary proceeding against VW Credit, certain individual employees of VW Credit, alleging that VW Credit's call of default against Coast was wrongful. Coast also named as defendants Volkswagen of America ("VOA") and

Audi of America("AOA"), VW Credit's parent companies in an effort to drive Coast out of business had intentionally stopped shipping vehicles to Coast after its Chapter 11 filing causing the dealership to suffer severe losses. Coast's claims against VOA and AOA were the subject matter of the trial and the present petition. The reference number was withdrawn and the matter came before the Hon. Garrett E. Brown, U.S.D.J.

On September 18, 1997, Coast dismissed its Chapter 11 proceeding with VW Credit being paid the accelerated balance under the prior floor-plan. By Order of April 24, 1998, the district court dismissed substantially all of Coast's complaint against VW Credit, including its breach of contract and breach of implied duty of good faith counts. By order of October 6, 1999, the district court dismissed the remaining two counts of Coast's complaint against VW Credit. The district court certified its two summary judgment orders as final and Coast filed a notice of appeal.

On or about April 6, 2001, the district court denied Coast's motion to stay or dismiss this proceeding in favor of the parallel state court matter and also denied VOA's and AOA's cross-motions for summary judgment.

On September 5, 2001, Coast, on the one hand, and Volkswagen of America and Audi of America on the other hand commenced trial on the remaining counts of Coast' complaint, Counts 17 and 18 of Coast's Supplemental Complaint. The claims were based upon VOA's and AOA's intentional deprivation of vehicles to Coast which began immediately after Coast filed its Chapter 11 petition. Under

Count 17, the jury found that VOA and AOA violated their contractual obligation to Coast to "provide a fair and equitable allocation of vehicles." 28a. Despite this, the jury did not find that VOA's and AOA's actions amounted to coercion within the meaning of the statute. 29a. Furthermore, under Count 18, the jury found that VOA and AOA violated N.J.S.A. 56:10-7(e)(which codifies the duty of good faith and fair dealing) by imposing unreasonable standards of performance upon Coast and trying to drive Coast out of business. 30a Verdict Sheet Question 5. In instructing the jury (53a-58a), over Coast's vehement written and oral objection, the district court interposed a jury instruction on N.J.S.A. 56:10-9 as a technical defense to Coast's claim, notwithstanding the fact that the model jury charge on the "duty of good faith and fair dealing" takes into account whether or not a complainant is being deprived of a benefit through its own failures or the actions of the accused. 30a Verdict Sheet Question 6. Thereafter, Coast moved for post-trial relief, which was denied. 26a.

On or about January 29, 2002, the United States Court of Appeals for the Third Circuit reversed the district court's finding based upon "judicial estoppel" that Coast had defaulted to VW Credit and remanded Coast's claims for breach of contract, breach of duty of good faith and fair dealing, lender liability and intentional discrimination. *See Coast Automotive Group, Ltd. v. VW Credit, Inc.*, 34 Fed. Appx. 818, 2002 WL 121932 (3rd Cir. (N.J.))

On or about October 30, 2002, the district court issued an opinion in the bench claims tried before it in the September 5-12, 2001 trial as well as entering judgment in favor of

VOA and AOA on the jury claims and in favor of Coast on VOA's and AOA's bench counterclaim. 26a-27a. Coast's substantially identical claims against VW Credit for breach of contract, breach of the duty of good faith and fair dealing were tried before the Superior Court of New Jersey, Law Division, with Coast prevailing proving that VW Credit committed a breach of contract, breach of the duty of good faith and fair dealing and committed lender liability. 20a-25a. Coast was awarded compensatory and punitive damages. 20a-25a. Subsequently on January 8, 2003, the district court dismissed, as moot, the only remaining claims in the case were the claims by Coast against VW Credit that had been remanded by this Court. 20a-25a.

LEGAL ARGUMENT FOR ALLOWANCE OF PETITION

I. THE THIRD CIRCUIT IMPROPERLY DISREGARDED THE PRECEDENT OF *VW CREDIT V. COAST AUTOMOTIVE GROUP, LTD, ET. AL., V. VOA AND AOA, ET. AL.*, 346 N.J. SUPER. 326, 787 A. 2D 951 (APP. DIV. 2002), *CERTIF. DENIED* 172 N.J. 178 (2002) IN WHICH THE SUPERIOR COURT, APPELLATE DIVISION, HELD THAT COAST WAS ELIGIBLE FOR RELIEF UNDER THE NEW JERSEY FRANCHISE PRACTICES ACT

The Third Circuit's mishandling of this matter compels certification by this Court. The Third Circuit's decision stands in total contradiction to settled New Jersey state law governing franchises and Coast respectfully submits that it is

this Court's duty to correct the Third Circuit's misapplication and misapprehension of New Jersey franchise law. Where a Circuit Court disregards state law precedent in matters governing state law, this Court must intervene and correct the injustice. This is particularly true in this case, where the Third Circuit did not even discuss or distinguish the most important arguments raised by Coast on appeal.

In fact, during the same time period for which the Third Circuit held that Coast was ineligible to obtain judicial relief under The New Jersey Franchise Practices Act, Coast in fact obtained judgment under the New Jersey Franchise Practices against VOA and AOA in the state court, as affirmed by the Appellate Division in a reported decision. *VW Credit v. Coast Automotive Group, Ltd, et. al., VOA and AOA, et. al.*, 346 N.J. Super. 326, 787 A. 2d 951 (App. Div. 2002), *certif. denied* 172 N.J. 178 (2002).

Not only was the Third Circuit's decision wrong, its reasoning was flawed and ignored the factual and legal record. In affirming the District Court, the Third Circuit reached a result totally contrary to the New Jersey Franchise Practices Act, contrary to common law contract law and contrary to the established New Jersey franchise precedent which Coast, itself, made against VOA and AOA in the matter of *VW Credit v. Coast Automotive Group, Ltd, et. al., VOA and AOA, et. al.*, 346 N.J. Super. 326.

In imposing the jury instruction and verdict sheet question under N.J.S.A. §56:10-9 over Coast's vehement objection, the district court totally misstated the law governing Count

18 of Coast's complaint and improperly nullified Coast's successful claim under N.J.S.A. 56:10-7(e).

The Third Circuit's decision ratified VOA's and AOA's novel position of contract law on this appeal, that VOA and AOA **could choose** (55a) to continue to be in a relationship with Coast(waiving a purported right to terminate), but only selectively perform at their sole and exclusive discretion. VOA's and AOA's position is unheard of in any principal of contract law or statutory construction and, in fact, directly contrary to long standing, unassailable principles of contract law. *Stamato v. Borough of Lodi*, 4 N.J. 14, 21 (1950).

Rather than have a sophisticated discussion of contract law, contract law being the basis for the New Jersey Franchise Practices Act, the Third Circuit merely recited the black letter of N.J.S.A. §56:10-9 without any examination of the differences between franchise "termination" and "non-termination" cases or providing any discussion of Coast's arguments. Quite remarkably, **the Third Circuit failed to account for the fact that Coast had obtained relief under The New Jersey Franchise Practices Act against none other than VOA and AOA**—an extraordinary feat for a party that is allegedly ineligible for relief under The New Jersey Franchise Practices Act. The decision reached by the Third Circuit is not only wrong, but the rule established by it does not work.

Therefore, the question(s) raised by Coast is(are) not just whether the Third Circuit made the right decision. The Third Circuit clearly did not. More, however, is required by this Court to grant certiorari. In arriving at its blatantly wrong

decision, the Third Circuit willfully ignored many aspects of Coast's argument and failed to deal with crucial questions concerning New Jersey state law and precedent which were put before it:

> Coast's main contention is that it was entitled to a verdict on the NJFPA claim because § 56:10-9 is not a defense to Coast's 1996-1997 allocation claims. It argues that the jury instruction and verdict sheet question completely misstated the law and essentially deprived Coast of its proper NJFPA claim under § 56:10-7(e). According to Coast, the District Court erred in instructing the jury to excuse VOA/AOA from all liability based on Coast's alleged substantial noncompliance with the franchise agreement because VOA/AOA never elected to terminate the contract in the relevant time period and because no factual nexus existed between Coast's inequitable allocation claim and the alleged material breach.

11a. In its decision, the Third Circuit failed to have any discussion, whatsoever about the differences between a "termination" case and a "non-termination case." And, in doing so, the Third Circuit created a "retroactive termination" case.

Furthermore, the Third Circuit misrepresented this as a "case of first impression." It was not:

> We must, as a federal court asked to decide an open question of state law, look to the fundamental principles of statutory construction that would in-

form the New Jersey court's consideration of the issue.

11a. Hardly a case of first impression, during this time period, Coast, itself, obtained judgment against VOA and and AOA pursuant to the New Jersey Franchise Practices Act and N.J.S.A. 56:10-6. The Third Circuit failed to address at all the *VW Credit v. Coast Automotive Group, Ltd, et. al., VOA and AOA, et. al.*, 346 N.J. Super. 326, 787 A. 2d 951 (App. Div. 2002), *certif. denied* 172 N.J. 178 (2002) matter and how, in the state court, Coast would be eligible for relief(and, in fact, obtain a judgment), but somehow ineligible for relief in the Federal Courts. The *VW Credit v. Coast* matter, like this one, was a non-termination matter. In that matter, despite VOA's and AOA's urging, the Appellate Division did not impose N.J.S.A. 56:10-9 or alleged non-compliance as a barrier to Coast obtaining judgment. In fact, the Appellate Division held that Coast was a franchisee **with all of its rights intact** including the right to transfer its franchises, pursuant to the New Jersey Franchise Practices Act. How can a dealership have right to transfer its franchises under the act and not have the right to a fair and equitable vehicle allocation? Applying the Third Circuit's rule, that Appellate Division judgment could not stand. It is the Third Circuit, however, that was totally wrong.

Coast is not asking this Court to ignore N.J.S.A. 56:10-9 or carve some novel exception. The question is not just whether N.J.S.A. 56:10-9 applies, but **how it applies**. Where is the requirement that N.J.S.A. 56:10-9 be embodied in a separate jury instruction and verdict sheet question? Given the jury instruction on the duty of good faith, it could

be said that N.J.S.A. **56:10-9 is already incorporated** inasmuch as the jury is required to lay blame with either the dealer or the franchisor in each case. **That is in order to find liability under the duty of good faith, the jury had to find that Coast had materially performed its obligations**:

> Section 56:10-9 provides that "[i]t shall be a defense for a franchisor, to any action brought under this act by a franchisee, if it be shown that said franchisee has failed to substantially comply with requirements imposed by the franchise and other agreements ancillary or collateral thereto." Giving these terms their normal meaning, as we must, we find no support for Coast's contention that the statutory defense does not apply to actions brought under § 56:10-7(e). To the contrary, § 56:10-9 provides a complete defense to a franchisor in "any action" brought under the NJFPA where the franchisee has itself committed a material breach of the franchise agreement.

12a. One cannot read one sentence of a lengthy statute, divorced from its context and divorced from the common law contract law and simply divine the "terms normal meaning." The Third Circuit's decision stands for the unique holding that while VOA and AOA 1) did not terminate Coast's franchises during 1996-1997 (55a) and 2) could not terminate Coast's franchises in 1996-1997(55a), somehow VOA and AOA were excused, retroactively, from good faith performance. That notion is simply inconsistent with every tenet of contract law that deals with performance and breach of contracts. It could not be more plainly wrong.

VOA and AOA having stipulated (55a) that they did not attempt to and in fact could not terminate Coast's franchises, Coast was an "innocent franchisee":

> The plain meaning of § 56:10-9 is consistent with the NJFPA's stated legislative policy of regulating the responsibilities of both the franchisee and the franchisor. In *Westfield Centre Service, Inc. v. Cities Service Oil Co.*, 432 A.2d 48, 55 (N.J. 1981), the New Jersey Supreme Court construed the "good cause" language of § 56:10-5 as limiting termination of the franchise agreement under the NJFPA only in cases where the franchisee committed a breach. The New Jersey Supreme Court recognized that the plain meaning of the "good cause" provision supported the "legislative desire to protect the innocent franchisee when the termination occurs at the franchisor's convenience." Id. The same can be said of § 56:10-9 and its application to § 56:10-7(e). The statutory defense does not protect the franchisor from suit brought under § 56:10-7(e) by an "innocent franchisee."

12a. The Third Circuit's reference to an "innocent franchisee" is overly simplistic and highlights the unsophisticated, inaccurate and incomplete analysis that the Third Circuit employed in examining this case. VOA and AOA stipulated in the jury instructions (55a) that **they elected, chose and were required** to stay in a relationship with Coast, which included performing in good faith. Then the jury determined that VOA and AOA tried to drive Coast out of business with unfair allocations. The New Jersey Franchise Practices Act,

as does the duty of good faith, prevents indirect, informal terminations, which are essentially "through the back-door." The only way a franchisor can relieve itself of its obligations to a franchisee is to terminate the franchise. There is no "in between." The Third Circuit's ruling however, is "in between." Unless and until a termination is accomplished the franchisor must perform in good faith. 58a. The Third Circuit's decision does not, in any way, recognize that immutable and unassailable maxim:

> Coast argues that § 56:10-9 is contrary to the common law duty of good faith and fair dealing as codified in § 56:10-7(e). Even if we assume that § 56:10-7(e) codifies the common law duty of good faith and fair dealing and that § 56:10-9 effects a change by providing a defense to franchisors not available at common law, we are not persuaded that § 56:10-9 is inconsistent with or inapplicable to actions brought under § 56:10-7(e).

13a. The citations by the Third Circuit in its decision (13a) are to terminations of a franchise, therefore, these cases do not deal with the issue that unless and until a franchise is terminated, the franchisee must be treated in good faith. 58a. And that is exactly what the *VW Credit, Inc. v. Coast* appeal stands for. The New Jersey Franchise Practices Act was not enacted to provide additional defenses to franchisors. Rather, it was enacted to enhance the protection available to franchisees:

> In New Jersey, statutes that impose duties or burdens, or establish rights, or provide benefits not

> recognized by common law, are subject to strict construction. *State v. International Fed'n of Prof'l and Technical Engrs.*, 780 A.2d 525 (2001). It is clear that if the statutory defense makes any change in the common law at all, it does so only with regard to those cases where the franchisee also breached the franchise agreement. And, as we have already discussed, § 56:10-9 so construed does not circumvent the Legislature's intended purpose for enacting NJFPA, that is to protect the innocent franchisee.

13a-14a. The Third Circuit totally misconstrued the concept of an "innocent franchisee." Innocent of what, one must ask? Contract law is not about innocence, it is about performance, breach, waiver, etc. 58a. Perhaps the concept of an "innocent franchisee" is relevant when a court is determining whether or not a franchisee should be terminated. **There is no principle of law, however, which allows one party of a contract to treat another in bad faith in the performance of the contract**. 14a, 58a.

II. IT WAS LEGAL ERROR, A MISSTATEMENT OF THE LAW AND AN INJUSTICE FOR THE JURY TO HAVE BEEN CHARGED ON N.J.S.A. §56:10-9 AND FOR THE VERDICT SHEET QUESTION 6 TO HAVE BEEN GIVEN WITH REGARD TO COUNT 18 OF COAST'S COMPLAINT (COAST'S CLAIM UNDER N.J.S.A. §56:10-7(E))

The erroneous jury instruction under N.J.S.A. §56:10-9 caused the jury to have to make impermissible, abstract, legal determinations. 53a-58a. In the case of Coast's claims, the jury was being called upon to make factual determinations following the New Jersey Model Jury Charge 4.10-18 on the duty of good faith and fair dealing. 43a-46a, 53a-58a. In the case of VOA's and AOA's purported defenses, the jury was asked to make legal determinations. 43a-46a. When one reviews the jury instructions prompted by N.J.S.A. §56:10-9, it is clear the jury was asked to engage in contract construction. 43a-46a, 53a-58a.

The jury properly rejected, as a factual matter, VOA's and AOA's allegations that Coast's own actions were the proximate cause of its inventory deprivation. 28a, 30a, 53a-58a. The jury determined that VOA and AOA breached the dealer agreement and treated Coast in an unfair and inequitable manner. 28a, 30a, 53a-58a. The jury determined that Coast was treated in bad faith by VOA and AOA and that VOA and AOA imposed *unreasonable standards of performance* upon Coast. 30a, 53a-58a.

Coast argued in its September 9, 2001 memorandum in opposition to the instruction on N.J.S.A. §56:10-9 that "In the present posture, collateral issues of contract construction are being thrown up to the jury for consideration. Rather, it is the jury's province to determine the facts of the case." (44a) and that "VOA and AOA are asking this Court to put an incorrect abstraction before the jury which will prejudice Coast's right to a fair determination based upon the evidence of the record." 45a. In fact, in pretrial *in limine* arguments, Coast's Counsel argued "I don't think that that can be a question that's posed to the jury as an issue to decide[...] ["]Has Coast breached its contract or has it made a misrepresentation ["] and use that as a defense to our [unrelated vehicle allocation] damages claim [?]" 63a; see also, VOA/AOA summation 59a. In fact, the jury's determination under Verdict Sheet Question 6 was wholly inconsistent with its factual findings as to Coast's allocation claims. 30a, 53a-58a.

The New Jersey Franchise Practices Act protects franchisees from bad faith performance including indirect termination of their franchises. That part of The New Jersey Franchise Practices Act known as N.J.S.A. §56:10-7(e) prohibits a franchisor from imposing "unreasonable standards of performance" on a franchisee. 53a-58a("The New Jersey Act prohibits manufacturers from imposing adverse conditions upon their franchisees, which amount to unreasonable standards of performance.") In *Gelardi v. Miller Brewing Company,* Judge Ackerman explained that N.J.S.A. 56:10-7(e) "can be read as a codification of a franchiser's responsibility to comply with the covenant of good faith and fair dealing." *See Carlo C. Gelardi v. Miller Brewing Company,* 502 F. Supp. 637, 653 (D.N.J. 1980).

In its September 9, 2001 memorandum in opposition to the jury instruction under N.J.S.A. §56:10-9 (43a-46a), Coast cited the seminal case on substantial compliance, *Amerada Hess Corp. v. Quinn,* 143 N.J. Super. 237, 253 (1976). The Superior Court in *Amerada Hess* found the underlying principles for The New Jersey Franchise Practices Act in principles of common law contract law.[1]

The authority of *Stamato & Co. v. Borough of Lodi* reinforces the long-established principle that a party must terminate or repudiate a contract or be left solely with a claim for damages:

> In a case of "'material breach of contract which does not, however, indicate any intention to renounce or repudiate the remainder of the contract...the injured party has a genuine election offered him of continuing performance or of ceasing performance, and **any action indicting an intention to perform will operate as a conclusive choice**, not indeed depriving him of a right of action for the breach which has already taken place, **but depriving him of any excuse for ceasing performance on his own part**. 5 Williston on Contracts(Rev. Ed. 3749)

---

[1] Judge Becker, in delivering the Third Circuit's opinion in *General Motors v. The New A.C. Chevrolet*, 263 F. 3d. 296 (2001), cited the same passage from *Amerada Hess* cited in Coast's letter memorandum at 608a at this Court's footnote 8, 263 F.3d 317.

Stamato v. Borough of Lodi, 4 N.J. 14, 21 (1950). (emphasis supplied). This is 180 degrees from the position taken by VOA and AOA. 55a. While the party asserting the right to terminate might ultimately be able to sue for damages for its period of inaction, a failure to terminate is a conclusive waiver of that particular right and there is no allowance for a retroactive termination or failure to perform. 55a.

As Coast had anticipated in its initial brief to the Third Circuit, VOA and AOA referred to the Third Circuit's decision in *General Motors Corp. v. The New A.C. Chevrolet, Inc.,* 263 F.3d 296, 320 (3rd Cir. 2001) for their opposition. *G.M. v. New A.C.,* however, is of no support to their argument in this particular case. *GM v. New A.C.* was a "termination" case. Coast has argued, pretrial, during trial, post-trial and in its appeal to the Third Circuit that common law contract law, the law of the duty of good faith and fair dealing and The New Jersey Franchise Practices Act all stand for the proposition that **unless and until a contract is terminated**, the parties **must perform in good faith**.

The Third Circuit erred in failing to require that VOA and AOA demonstrate a factual relationship between Coast's affirmative allocation claims decided in Coast's favor and the purported substantial non-compliance alleged by VOA and AOA as a defense to that affirmative claim. This further indicated that instruction under N.J.S.A. §56:10-9 and Verdict Sheet Question 6 were erroneous. Coast has not argued that N.J.S.A. §56:10-9 is irrelevant in all cases. This was not a franchise termination case, it was an allocation case that dealt with the performance of the contract. In a franchise termination case, where a proper notice of termination has

been issued, the franchisor argues the grounds for termination that are set forth in the franchise agreement. At argument on *in limine* motions, well before jury instructions were discussed, Coast raised the fact that there was no connection between VOA's and AOA's arguments under N.J.S.A. §56:10-9 of essentially alleged technical breaches of contract and the failure of Coast to receive a fair and equitable allocation of vehicles. 60a-64a.

Bolstered by the knowledge that the district court was going to give an incorrect jury instruction, VOA and AOA made pure legal arguments in their closing. 58a-59a.

The jury did not find a factual nexus between VOA's and AOA's allegations and Coast's ability to acquire more inventory. 28a-30a, 53a-58a. It is clear that the jury blamed VOA and AOA for Coast's slashed allocation and concluded that VOA and AOA were trying to drive Coast out of business. 28a-30a, 53a-58a.

According to the district court's presentation of the jury instructions and verdict sheet, every single action brought by a franchisee against a franchisor would eventually boil down to a legal verdict sheet question under N.J.S.A. §56:10-9 as to any possible non-compliance (related or unrelated to the franchisee's complaint) that a franchisor could dream up. This would be the case no matter how small or how big or what the subject matter of the complaint was—whether the issue was warranty reimbursement from a franchisor(in the case of automobile dealership service departments), display of signage and trademarks, etc. 64a. That is a legal fiasco

and that is exactly what happened to Coast in the district court.

III. THE MOST GLARING ERROR IN THE THIRD CIRCUIT'S DECISION IS THAT DURING THE SAME PERIOD, IN THE STATE COURT, COAST OBTAINED A JUDGMENT AGAINST VOA AND AOA UNDER THE NEW JERSEY FRANCHISE PRACTICES ACT, SHOWING AS A MATTER OF LAW, THAT COAST WAS ELIGIBLE FOR RELIEF UNDER THE NEW JERSEY FRANCHISE PRACTICES ACT IRRESPECTIVE OF VOA'S AND AOA'S CONTENTIONS OF ALLEGED NON-COMPLIANCE.

VOA and AOA contend that the Superior Court of New Jersey, Appellate Division's legal determination that Coast's method of purchasing vehicles was substantially compliant is of no moment. VOA and AOA are incorrect.

In April 1999, VOA and AOA issued notices of termination, alleging that Coast was substantially non-compliant with respect VOA's and AOA's wholesale floor-plan line of credit requirement. The Superior Court, Law Division, enjoined the termination attempts. Thereafter, as a matter of law, the Superior Court, Appellate Division held that Coast buying cars with the equivalent of C.O.D. is not a material breach of its obligations. *See VW Credit v. Coast,* 346 N.J. Super. 336, 787 A.2d 957(**"This is not a case where a franchisee was in substantial breach of its obligations under the franchise agreements..."**(emphasis supplied) Of

course, VOA and AOA do not cite to that part of the Appellate Division decision, which is a crystal clear statement of law.

Just as the district court noted in its *in limine* arguments that VOA and AOA "can say they felt that [Coast was] in breach. As to whether there actually was a breach, that's a legal issue (61a)" the issue before the Appellate Division was one of law. It is of no moment that the Appellate Division was looking at whether or not a preliminary injunction was warranted or not as opposed to other relief. As a matter of law, Coast was either in substantial breach or it was not. In this case the Appellate Division held that Coast was not. *See VW Credit v. Coast,* 346 N.J. Super. 336, 787 A.2d 957. No amount of revisiting the situation could or should change the legal outcome as to whether or not, for the purposes of The New Jersey Franchise Practices Act, that buying vehicles in the manner that Coast did was substantially compliant or not. *Id.* Until the Appellate Division or Supreme Court changes or modifies the holding in the *VW Credit v. Coast* appeal, buying vehicles on C.O.D. or its equivalent is substantially compliant. *See VW Credit v. Coast,* 346 N.J. Super. 336, 787 A.2d 957. The Appellate Division noted that Coast paid for all the vehicles it received and did not owe Volkswagen or Audi any money. *See VW Credit v. Coast,* 346 N.J. Super. 336, 787 A.2d 957. As noted above, it appears that the *VW Credit v. Coast* matter is the only New Jersey Franchise Practices Act case that deals with wholesale lines of credit, which is the precise issue in this case.

It is worthy of note that the Volkswagen and Audi dealer agreements list specific grounds for termination of the

agreement. **Not one of the grounds for termination pertains to floor plan lines of credit**. The Third Circuit disregarded that the New Jersey Appellate Division held as a legal matter that Coast (and other similarly situated franchisees), had its rights intact and had protected and defensible rights including the right to seek and obtain relief under The New Jersey Franchise Practices Act.

In the *VW Credit v. Coast v. VOA and AOA* appeal, the Appellate Division held that, as a matter of law, since Coast's method of purchasing vehicles was substantially compliant, the Superior Court properly enjoined the termination of Coast's franchises. *VW Credit v. Coast*, 346 N.J. Super. 336, 787 A. 2d 957. In fact, on April 5, 1999, the district court expressly forbid the termination notices from being litigated in this case. 35a.

The Appellate Division further held that the termination attempt having been enjoined, Coast remained a franchisee with enforceable rights (*see VW Credit v. Coast*, 346 N.J. Super. 337, 787 A.2d 957) including the right to prevail against VOA and AOA for wrongfully withholding consent to allow Coast to sell its Volkswagen and Audi franchises. Where was N.J.S.A. §56:10-9 stopping Coast's right to transfer its franchises? If the Third Circuit's decision in this matter were correct and N.J.S.A. §56:10-9 was a black and white hurdle that needed to be dealt with in the manner that they argue, then Coast could not have won the right to transfer its franchises. The Superior Court Appellate Division and the Supreme Court of New Jersey would have necessarily have to have made the wrong decision.

Throughout, Coast, as a franchisee with rights, had a right to fair and equitable allocation of vehicles (28a) and had a right not to have unreasonable standards of performance thrust upon it (30a). *See VW Credit v. Coast,* 346 N.J. Super. 337, 787 A.2d 957.

The Third Circuit failed to answer a crucial question that Coast challenged the Third Circuit to answer: after the September 2001 trial, what are Coast's rights under The New Jersey Franchise Practices Act? If the Third Circuit's decision's were applied Coast would be in some type of grey area where Coast was a franchisee, Coast has not been terminated, yet it cannot recover against VOA and AOA even when it proves by a unanimous jury that unreasonable standards of performance were thrust upon it?

Based upon the theory that N.J.S.A. 56:10-9 is alleged to be a "defense," to a claim, the only reasonable conclusion is that the legislature intended the "defense" to be germane to the claim being made as any other "defense" in a contract action would otherwise have to be.

IV. EVEN IF AN INSTRUCTION AND VERDICT SHEET QUESTION UNDER N.J.S.A. §56:10-9 WERE PERMISSIBLE ON COUNT 18 OF COAST'S COMPLAINT, THE SUBSTANTIAL AND CREDIBLE WEIGHT OF EVIDENCE DID NOT SUPPORT A FINDING AGAINST COAST.

Coast's position is that the issues surrounding N.J.S.A. §56:10-9 represented improper legal questions being posed to the jury. To the extent that any part is deemed to be a factual question, the jury's determination on the purported

issue of "substantial non-compliance" was also against the weight of the evidence. 30a Verdict Sheet Question 6.

Given the Appellate Division's ruling, as a matter of law, the jury's finding was against the weight of the evidence, since under The New Jersey Franchise Practices Act, the allegations made by VOA and AOA, as a matter of law, do not constitute "substantial non-compliance." *See VW Credit v. Coast*, 346 N.J. Super. 336. Therefore, not only was the submission of an instruction regarding N.J.S.A. §56:10-9 error, VOA and AOA did not present evidence to the jury to support a finding that Coast was substantially non-compliant.

VOA and AOA made arguments that simply amounted to technical defects or omissions, which by definition, are not substantial non-compliance. On Verdict Sheet Questions 1(28a) and 5(30a), the jury made factual findings that VOA and AOA 1) had breached the dealer agreement by giving Coast an unfair and inequitable allocation of vehicles 2) that VOA and AOA violated the duty of good faith and fair dealing 3) that VOA and AOA indirectly attempted to drive Coast out of business. 53a-58a. Furthermore, in order to find as it did on Verdict Sheet Question 5(30a) the jury had to find that 1) Coast was giving an honest effort in performing its contractual obligations and 2) that VOA and AOA were not. 53a-58a.

Regarding the issue of Coast's alleged technical breach with respect to its wholesale floor-plan line of credit and alleged breach with respect to its dealer application, absolutely no link was articulated by VOA and AOA or made by the jury to Coast's performance as a dealer, nor, over Coast's

objection, did the district court require a link. 53a-58a, 63a-64a.

The jury was instructed that a breach by a dealer, in order to be material, must have an effect on the trade name of the franchisor. 54a-55a. VOA and AOA did not present one scintilla of evidence, no less a preponderance of the evidence, that anything allegedly done by Coast had, or even potentially could, affect its trade name within the meaning of the concept of "substantial non-compliance." VOA's Chuck Domke was the VOA representative who dealt most frequently with Coast from December 1995 through September 1997. He was what is known as the "Area Executive" for Coast's dealership and the surrounding Volkswagen dealers. VOA's Chuck Domke, on direct examination, not only on cross-examination, **but on direct examination**, testified that Coast always had excellent Customer Satisfaction ratings. 50a. These are airtight admissions that nothing complained of by VOA and AOA could meet the standard of "substantial non-compliance." Furthermore, Domke admitted that he never even had a discussion with Coast as to whether or not it had the money to buy more vehicles. 50a. With an historic and evidentiary record to draw from, the jury cannot speculate contrary to the airtight admissions of VOA's own personnel.

The jury determined, as a factual matter, that Coast did not get its fair share allocation of vehicles and that failure was attributable to VOA and AOA and not Coast's conduct. 28a, 30a, 53a-58a. There was absolutely no evidentiary basis presented through any document that anything in Coast's conduct did or could pose a risk of harm to the Volkswagen or

Audi name. 50a. In fact, the only testimony was that Coast was a credit to the Volkswagen and Audi name. 50a. Since VOA and AOA's personnel admitted Coast was a credit to the name and no evidence was brought in, whatsoever, contrary to that, the jury had no evidence from which it could conclude that Coast had ever caused injury to VOA's and AOA's name.

VOA and AOA cannot make the circular argument that the mere technical issue pertaining to Coast's floor-plan line of credit could affect their trade name, since the jury found that the proximate cause of Coast's lack of inventory was VOA's and AOA's fault and not Coast's. The jury found that **VOA's and AOA's actions imposed unreasonable standards of performance on Coast**. 28a(Verdict Sheet Question 1), 30a(Verdict Sheet Question 5), 53a-58a. **In fact, AOA's Brendan Bouch, through deposition read, testified that Coast's method of purchasing vehicles was perfectly fine.** 52a.

Opening statements and closing arguments of counsel do not provide an evidentiary basis for such a finding. Therefore, VOA's and AOA's counsel's editorials and characterization of the evidence do not provide a basis for an evidentiary determination by the jury:

[VOA's Counsel's Opening]

> The problems that happened at Coast were all the result of selling cars out of trust, not having enough money, filing bankruptcy. As you'll see

> the minute they got out of bankruptcy, they started to get a lot more cars.[2]

58a. Besides VOA's and AOA's counsel's opening and closing statements, there was nothing in the witness testimony which could have formed the basis for a finding of "substantial non-compliance." VOA and AOA argued in their opposition brief that their second alleged "substantial non-compliance" formed a sufficient basis for a jury finding. That argument fails equally. All that VOA and AOA did was make an argument of a technical breach. VOA and AOA contended that Mr. Shansab's original financial investment of funds in Coast in 1991(six years before litigation began with VOA and AOA) could not be considered his "personal funds" because in 1991 he had obtained the money from third party friends of his. That is what VOA's and AOA's entire argument as to this alleged breach centers on—the "characterization"—of Mr. Shansab's money. The argument does not center on whether the money was invested in the dealership, because no one contends that Mr. Shansab did not make the proper investment in the dealership.

While VOA and AOA cite to the district court's bench opinion on the rescission counterclaim as support, that reliance fails. The bench opinion dealt solely with Mr. Shansab's dealership application in 1991 and entirely different document than the 1997 renewal Dealer Agreement,

---

[2] It is important to note the admission by counsel that despite the duty of good faith and despite Chapter 11 protection, VOA and AOA withheld inventory while Coast was in Chapter 11.

which was in effect in 2001. The bench opinion did not look at the subsequent dealer agreements and determine whether or not a breach or substantial breach of the terms of the dealer agreements occurred or whether or not any of the information connected with those agreements was inaccurate. The subsequent dealer agreements can only be breached if there is a material misrepresentation of a fact **relied upon** by the franchisor in issuing the dealer agreements as set forth in Third Circuit Appendix pages 1546a-1547a. VOA and AOA, rather, seem to argue for some type of perpetual breach theory, that Coast would allegedly be continuously and forever in breach of its renewed dealer agreements for something that was stated in its dealer application in 1991. There is no such known theory in contract law. Coast's original dealership application and the subsequent renewal of the dealer agreements are apples and oranges. To the extent that VOA and AOA are going to argue that the evidence supported the finding of a "substantial breach" of specific agreements, then they must be required to demonstrate which language of each agreement was breached, what information formed the basis of the breach and what evidenced that specific breach at trial. The district court required none of this from VOA and AOA. The 1997 Volkswagen Dealer Agreement(a two page agreement signed by the dealer)(Third Circuit Appendix pages 1546a-1547a) and the Volkswagen Standard Provisions(a booklet that sets forth the general guidelines for the relationship) (Third Circuit Appendix pages 1551a-1579a) relate to one another, not back to Coast's original application to World-Wide Volkswagen, an independent distributor unrelated to VOA and AOA. In fact, nowhere do the Volkswagen Dealer Agreement (Third Cir-

cuit Appendix pages 1546a-1547a) or the Volkswagen Standard Provisions (Third Circuit Appendix pages 1551a-1579a) refer back to a dealer's initial application. It is not a breach of the Volkswagen Dealer Agreement or the Volkswagen Standard Provisions if a dealer's original application allegedly had an error, mistake or misstatement in it. It is simply a 100% legal impossibility for VOA's and AOA's contention raised with respect to Coast's 1991 dealer application to be a breach of the dealer agreements executed in 1992 and 1997, respectively. There is nothing in the Volkswagen Dealer Agreement (Third Circuit Appendix pages 1546a-1547a) and the Volkswagen Standard Provisions (Third Circuit Appendix pages 1551a-1579a) that pertains to the original source of a dealer's funds. Not one single word. The Third Circuit completely glossed over this. A termination of a franchise can only take place if a dealer fails to comply with the requirements of a franchise agreement then in effect. *See* N.J.S.A. 56:10-5. Likewise, since VOA and AOA argue for a hyper-technical application of N.J.S.A. 56:10-9, the precise language of N.J.S.A. 56:10-9 does not permit "substantial non-compliance" to be asserted for an alleged past breach, the language is present tense concerning the agreement then in effect. There is not one scintilla of evidence or argument in the record from which it could be concluded by a jury that the issue pertaining to Mr. Shansab's source of funds in 1991 could serve as a breach of the subsequent dealer agreements, agreements which were executed in 1992 and 1997. There is no legal basis for such an argument to serve as a defense against VOA's and AOA's adjudicated allocation discrimination and failure to comply with the duty of good faith and fair dealing which occurred

after December 1995. There was not one scintilla of evidence that the information in Coast's dealer application submitted to the unrelated corporation World Wide Volkswagen in 1991 later posed a risk to VOA's and AOA's trade name, since VOA's and AOA's representatives testified that Coast was an excellent dealer.

V. AS TO COUNT 17 OF PLAINTIFF'S COMPLAINT, THE JURY'S FINDING ON VERDICT SHEET QUESTION 2 WAS AGAINST THE SUBSTANTIAL WEIGHT OF THE CREDIBLE EVIDENCE OF THE RECORD

Coast's Count 17 of its complaint was under the Automobile Dealers' Day in Court Act 15 U.S.C. §1221 et. seq. The jury concluded by a preponderance of the evidence that VOA and AOA had violated the dealer agreement by failing to give Coast a fair and equitable allocation of vehicles (28a Verdict Sheet Question 1) and that VOA and AOA tried to drive Coast out of business (30a, Verdict Sheet Question 5). In the Third Circuit briefing, VOA and AOA corroborated Coast's position. VOA and AOA made reference to a statement by Coast that during the Chapter 11 that Coast believed it had to offer its dealerships for sale. But for VOA's and AOA's adjudicated wrongful deprivation of vehicles driving Coast almost to the point of liquidation, there would have been no reason for Coast to believe that it had to sell its dealership.

The actions of VW Credit, VOA's and AOA's subsidiary, simply provide the proper context to demonstrate why VOA and AOA would have a reason to give Coast an unfair allo-

cation of vehicles and try to drive it out of business and coerce to surrender its franchises against its will. Until VW Credit acted against Coast, Coast had no problems with VOA and AOA. The jury, however, found that after December 1995, VOA and AOA failed to provide a fair and equitable allocation of vehicles and that was an attempt to drive Coast out of business.

After finding that VOA and AOA breached their contract with Coast and failed to provide Coast with a fair and equitable allocation of vehicles (28a, Verdict Sheet Question 1), the jury did not respond in the affirmative to Verdict Sheet Question 2 which asked the jury to determine whether or not VOA's and AOA's actions were coercive were within the meaning of the Automobile Dealers' Day in Court Act. (28a Verdict Sheet Question 2). Yet the jury clearly found that VOA's and AOA's actions were an attempt to drive Coast out of business. 30a (53a-60a). Both Coast's management and its dealer principal testified that they were told by Volkswagen's Chuck Domke that Coast was not going to get any more vehicles. Likewise, Coast's management and its dealer principal testified that during the periods of deprivation of vehicles, VOA pressured Coast to sell back its franchises. In the jury instructions, language was inserted that a manufacturer is free to advance its own interests and that it may urge compliance with its purported franchise obligations and that such conduct is not a violation of the statute. *See General Motors v. New A.C.*, 263 F. 3d 327. While such statements may not be a per se violation of the statute, *General Motors v. New A.C.* states that in making such statements and in advancing its alleged interests, a franchisor *may still* be acting coercively and be in violation of the statute if

its urgings and actions are pretext, which is contrary to the district court's charge in this matter.

The requirement for The Automobile Dealers' Day in Court Act is that the underlying *acts* of coercion or intimidation be real or palpable. The jury agreed with Coast's argument that it had been wrongfully and intentionally deprived of inventory for the purposes of trying to drive it out of business. 30a. (53a-58a). VOA and AOA, itself, introduced into evidence the Order appointing a Chapter 11 trustee to liquidate Coast's dealership as a going concern or, if necessary, piece by piece. It was unrebutted that Coast received only a handful of vehicles in the next four months after the order was entered. It was unrebutted that days after the Chapter 11 was dismissed, Coast started receiving vehicles again. VOA and AOA offered no explanation for this whatsoever.

CONCLUSION

Based upon the within argument, Coast respectfully requests that its petition for a writ of certiorari to this Court be accepted.

Respectfully submitted,

Geoffrey J. Hill, Esq.
Attorney at Law
N.U.S. Corporate Plaza
1 Maynard Drive, Suite 6
Park Ridge, NJ 07656
(201) 505-1033
Attorney for Petitioner

APPENDIX

APPENDIX A – ORDER DENYING PETITION FOR REHEARING EN BANC, FILED FEBRUARY 25, 2005

NOT PRECEDENTAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-1418

COAST AUTOMOTIVE GROUP, LTD.,
DELAWARE CORPORATION
d/b/a TSE MOTOR CARS;

ASPEN KNOLLS AUTOMOTIVE GROUP, LLC,
(Intervenor in D.C.)
v.
VW CREDIT, INC., A CORPORATION; VOLKSWAGEN OF AMERICA, A CORPORATION; AUDI OF AMERICA, A CORPORATION; MARGE YOST; MICHAEL RUECKERT; STEPHEN JOHNSON

Coast Automotive Group, Ltd.

Appellant

Before:SCIRICA, *Chief Judge,* SLOVITER, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY AMBRO, SMITH, FISHER, and VAN ANTWERPEN *Circuit Judges.*

ORDER

The petition for rehearing *en banc* filed by the Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is denied.

By the Court,

/s/ JANE R. ROTH
Circuit Judge

Dated: 25 February 2005

APPENDIX B – JUDGMENT, FILED JANUARY 25, 2005

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-1418

COAST AUTOMOTIVE GROUP, LTD.,
DELAWARE CORPORATION
d/b/a TSE MOTOR CARS;

ASPEN KNOLLS AUTOMOTIVE GROUP, LLC,
(Intervenor in D.C.)
v.
VW CREDIT, INC., A CORPORATION; VOLKSWAGEN OF AMERICA, A CORPORATION; AUDI OF AMERICA, A CORPORATION; MARGE YOST; MICHAEL RUECKERT; STEPHEN JOHNSON

Coast Automotive Group, Ltd.

Appellant

On Appeal from the United States District Court
for the District of New Jersey (D.C. No. 97-cv-02601)
District Judge: Hon. Garrett E. Brown

Before: Roth, Ambro, and Chertoff, *Circuit Judges*

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the District of New Jersey and was submitted pursuant to Third Circuit LAR 34.1 (a) on March 22, 2004.

On consideration whereof,

IT IS NOW HEREBY ADJUDGED and ORDERED that the judgment of the district court entered October 30, 2002, be and the same is hereby affirmed. Costs taxed against appellant.

All of the above in accordance with the opinion of this Court.

ATTEST:

_____

Acting Clerk

Dated: 25 January 2005

APPENDIX C – OPINION OF THE COURT, FILED JANUARY 25, 2005

NOT PRECEDENTAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-1418

COAST AUTOMOTIVE GROUP, LTD.,
DELAWARE CORPORATION
d/b/a TSE MOTOR CARS;

ASPEN KNOLLS AUTOMOTIVE GROUP, LLC,
(Intervenor in D.C.)
v.
VW CREDIT, INC., A CORPORATION; VOLKSWAGEN OF AMERICA, A CORPORATION; AUDI OF AMERICA, A CORPORATION; MARGE YOST; MICHAEL RUECKERT; STEPHEN JOHNSON

Coast Automotive Group, Ltd.

Appellant

On Appeal from the United States District Court for the District of New Jersey (D.C. No. 97-cv-02601) District Judge: Hon. Garrett E. Brown
Submitted Under Third Circuit LAR 34.1(a)
on March 22, 2004

Before: Roth, Ambro, and Chertoff, *Circuit Judges.*

(Filed: January 25, 2005)

OPINION OF THE COURT

ROTH, *Circuit Judge.*

This case concerns a jury verdict in favor of Volkswagen of America and Audi of America (VOA/AOA) on two claims brought by VOA/AOA's franchisee, Coast Automotive Group, Ltd. Coast alleged that VOA/AOA's failure to make a fair and equitable allocation of motor vehicles to Coast after Coast lost its line of credit and went into bankruptcy violated both the New Jersey Franchise Practices Act (NJFPA), N.J. Stat. Ann. § 56:10-7(e), and the Automobile Dealers' Day in Court Act (Dealers' Act), 15 U.S.C. § 1221 et seq. Although the jury decided that VOA/AOA violated § 56:10-7(e) of the NJFPA by failing to make a fair and equitable allocation, it also found that VOA/AOA was not liable because Coast failed to substantially comply with the franchise agreement. As for the Dealers' Act claim, the jury found that VOA/AOA's conduct was not an attempt to coerce or intimidate Coast into giving up or selling its franchise. The main issues we face on this appeal are whether the jury instruction and related verdict sheet question addressing § 56:10-9 as a complete defense to liability under the NJFPA were an accurate statement of the law, and whether the jury verdict on VOA/AOA's defense to the NJFPA claim and the verdict on the Dealers' Act claim were against the weight of the evidence.

I. FACTUAL AND PROCEDURAL HISTORY

Coast was an authorized retailer of Volkswagen and Audi vehicles that owned new vehicle dealerships in Toms River, New Jersey. Beginning in 1991, Volkswagen Credit, Inc. (VCI), a subsidiary of VOA/AOA, provided Coast with floor plan financing so that Coast could purchase vehicles for its inventory. In December 1995, VCI called Coast into default under the provisions of their agreements and, soon thereafter, filed a state court action in the Law Division of a New Jersey Superior Court seeking repayment of the debt, *VW Credit, Inc. v. Coast Automotive Group, Ltd., et al.*, Docket No. OCN-L-1162-96. On December 15, 1995, Coast filed a Chapter 11 petition in the United States Bankruptcy Court for the District of New Jersey. The bankruptcy action was dismissed on September 18, 1997. Although Coast lost its wholesale line of credit during the pendency of the bankruptcy, it continued to acquire inventory by paying with checks or drafts against its regular checking account or through a series of cash collateral orders that allowed Coast to use the proceeds from the sale of new vehicles to purchase replacement vehicles. Because Coast did not have a wholesale line of credit which would provide for timely replacement of the new vehicle inventory, however, VOA/AOA representatives had to intervene to get new vehicles assigned to Coast, and then arrange for and confirm payment and shipment on each new vehicle. This process both delayed and reduced the allocation of new vehicles to Coast. Coast also complained that, in order to force the dealership to fold, VOA/AOA was deliberately giving it vehicles that were hard

to move such as cars of an undesirable color or cars with stick shifts.

In January 1997, Coast filed a complaint in the Bankruptcy Court against VCI, several VCI employees, and VOA/AOA, essentially alleging that VCI wrongfully called Coast into default. That action was withdrawn from the Bankruptcy Court in May 1997 and transferred to the United States District Court for the District of New Jersey. In April 1998 and October 1999, the District Court granted VCI summary judgment on all counts of Coast's initial sixteen count complaint. Coast appealed.

Meanwhile, Coast amended its complaint adding two claims against VOA/AOA, alleging that VOA/AOA failed to provide sufficient inventory to Coast during the course of Coast's Bankruptcy proceedings in violation of the NJFPA and the Dealers' Act. VOA/AOA amended its Answer in October 1999 to assert a counterclaim under New Jersey law seeking equitable rescission of its franchise agreements with Coast.[1] The District Court held a jury trial in September 2001 on the NJFPA and Dealers' Act claims. The jury returned its verdict in favor of VOA/AOA on both of Coast's statutory causes of action. On October 30, 2002, the District Court entered judgment in VOA/AOA's favor on the NJFPA and Dealers' Act claims. Earlier in 2002, this Court had affirmed

---

[1] On October 30, 2002, the District Court rendered a bench opinion on VOA/AOA's counterclaim, finding that although Coast made material misrepresentations in its franchise application, VOA/AOA was not entitled to rescission because it failed to prove damages. Neither party has appealed the District Court's ruling.

in part and vacated in part the District Court's grant of summary judgment in VCI's favor, remanding the vacated claims against VCI for trial. Judgment became final on January 8, 2003, when the District Court dismissed the remanded claims against VCI as moot after Coast had prevailed in the state court action on identical claims against VCI.

As for the state court action, it had proceeded on a parallel course with the Federal action. In April 1998, Coast impleaded VOA/AOA, alleging the same NJFPA and Dealers' Act claims as those raised in the federal action, along with other statutory and common law claims against VCI. VOA/AOA asserted an identical counterclaim for equitable rescission of its franchise agreements. In July 2002, the state court denied VOA/AOA's summary judgment motion seeking claim and/or issue preclusion as to the NJFPA and Dealers' Act claims and the case proceeded to trial in August 2002.[2] At the conclusion of the presentation of evidence, Coast's NJfPA claims against VOA/AOA were dismissed with prejudice at Coast's request. The jury found in VOA/AOA's favor on the Dealers' Act claim. The state court entered judgment in VOA/AOA's favor on April 7, 2003. Coast's state court appeal is pending.

---

[2] We find no merit in VOA/AOA's argument that the judgment in the state court action is entitled to *res judicata* effect, precluding further proceedings in this Court. VOA/AOA's motion to preclude the state action on grounds of *res judicata* has already been rebuffed by the New Jersey Superior Court. We agree with Coast that VOA/AOA's appeal in this Court of the first adjudication does not constitute a third forum in which the NJFPA and Dealer's Act claims are being litigated.

II. JURISDICTION AND STANDARDS OF REVIEW

We have jurisdiction under 28 U.S.C. § 1291.[3] We employ plenary review to determine whether jury instructions misstate a legal standard. *Savarese v. Agriss*, 883 F.2d 1194, 1202 (3d Cir. 1989). We look at the entire set of instructions to the jury and ascertain if they adequately contain the law applicable to the case and properly apprise the jury of the issues in the case. *Douglas v. Owens*, 50 F.3d 1226, 1233 (3d Cir.1995). A jury verdict will not be overturned unless the record is critically deficient of that quantum of evidence from which a jury could have rationally reached its verdict. *Swineford v. Snyder County*, Pa., 15 F.3d 1258, 1265 (3d Cir. 1994).

III. DISCUSSION

A. The Jury Instruction and Verdict Sheet

---

[3] Shortly before trial in the federal action 2001, Aspen-Knolls Automotive Group, LLC, the contract purchaser of Coast's franchises, intervened in the federal action, seeking a ruling that any judgment or other relief obtained by VOA/AOA on its equitable rescission counterclaim would not adversely impact Aspen's right acquire Coast's Volkswagen and Audi Franchises. None of the District Court orders expressly disposed of the complaint. Upon review of the parties' responses to our inquiry as to the status of the Aspen complaint, we are now satisfied that we have jurisdiction to consider the matter. VOA/AOA did not prevail on its counterclaim, and thus, it was not necessary for the District Court to adjudicate Aspen's complaint in intervention and the Judgment and Order closing the federal action entered on January 8, 2003, was final as to all claims.

Coast's main contention is that it was entitled to a verdict on the NJFPA claim because § 56:10-9 is not a defense to Coast's 1996-1997 allocation claims. It argues that the jury instruction and verdict sheet question completely misstated the law and essentially deprived Coast of its proper NJFPA claim under § 56:10-7(e). According to Coast, the District Court erred in instructing the jury to excuse VOA/AOA from all liability based on Coast's alleged substantial noncompliance with the franchise agreement because VOA/AOA never elected to terminate the contract in the relevant time period and because no factual nexus existed between Coast's inequitable allocation claim and the alleged material breach.

The question before us is whether § 56:10-9 applies in actions brought under § 56:10-7(e). The parties have cited no New Jersey law on point and we have found no decision of the New Jersey Supreme Court, or of lower state courts, on point. We must, as a federal court asked to decide an open question of state law, look to the fundamental principles of statutory construction that would inform the New Jersey court's consideration of the issue. New Jersey abides by well-known rules of statutory construction. In New Jersey, when a statute is clear and unambiguous on its face, "the sole function of the courts is to enforce it according to its terms." *Velazquez v. Jiminez*, 798 A.2d 51, 61 (2002). "All terms in the statute should be accorded their normal sense and significance." Id. The "overriding objective in determining the meaning of a statute is to effectuate the legislative intent in light of the language used and the objectives sought to be achieved." *McCann v. Clerk of the City of Jersey City*, 771

A.2d 1123, 1128 (N.J. 2001) (quoting *State v. Hoffman*, 695 A.2d 236, 243 (N.J. 1997)).

Section 56:10-9 provides that "[i]t shall be a defense for a franchisor, to any action brought under this act by a franchisee, if it be shown that said franchisee has failed to substantially comply with requirements imposed by the franchise and other agreements ancillary or collateral thereto." Giving these terms their normal meaning, as we must, we find no support for Coast's contention that the statutory defense does not apply to actions brought under § 56:10-7(e). To the contrary, § 56:10-9 provides a complete defense to a franchisor in "any action" brought under the NJFPA where the franchisee has itself committed a material breach of the franchise agreement.

The plain meaning of § 56:10-9 is consistent with the NJFPA's stated legislative policy of regulating the responsibilities of both the franchisee and the franchisor. In *Westfield Centre Service, Inc. v. Cities Service Oil Co.*, 432 A.2d 48, 55 (N.J. 1981), the New Jersey Supreme Court construed the "good cause" language of § 56:10-5 as limiting termination of the franchise agreement under the NJFPA only in cases where the franchisee committed a breach. The New Jersey Supreme Court recognized that the plain meaning of the "good cause" provision supported the "legislative desire to protect the innocent franchisee when the termination occurs at the franchisor's convenience." Id. The same can be said of § 56:10-9 and its application to § 56:10-7(e). The statutory defense does not protect the franchisor from suit brought under § 56:10-7(e) by an "innocent franchisee.

This Court and federal district courts have recognized that § 56:10-9 allows a franchisee's substantial noncompliance to serve as a complete defense to any action brought under the NJFPA. See *General Motors Corp. v. New A.C. Chevrolet, Inc.*, 263 F.3d 296, 321 n. 11 (3d Cir. 2001); *In re The Matterhorn Group, Inc.*, Nos. 97B 41274-97B 41278, 2002 Bankr. Lexis 1275 (Bkr. S.D.N.Y. November 15, 2002); *Zaro Licensing, Inc. v. Cinmar, Inc.*, 779 F.Supp. 276, 286 (S.D.N.Y. 1991) ("It is a defense to a claim brought under the act [NJFPA] by a franchisee that the franchisee has failed to comply substantially with the requirements imposed by the franchisor").

Coast argues that § 56:10-9 is contrary to the common law duty of good faith and fair dealing as codified in § 56:10-7(e). Even if we assume that § 56:10-7(e) codifies the common law duty of good faith and fair dealing and that § 56:10-9 effects a change by providing a defense to franchisors not available at common law, we are not persuaded that § 56:10-9 is inconsistent with or inapplicable to actions brought under § 56:10-7(e). In New Jersey, statutes that impose duties or burdens, or establish rights, or provide benefits not recognized by common law, are subject to strict construction. *State v. International Fed'n of Prof'l and Technical Engrs.*, 780 A.2d 525 (2001). It is clear that if the statutory defense makes any change in the common law at all, it does so only with regard to those cases where the franchisee also breached the franchise agreement. And, as we have already discussed, § 56:10-9 so construed does not circumvent the Legislature's intended purpose for enacting NJFPA, that is to protect the innocent franchisee.

Accordingly, we conclude that the District Court did not err in its instruction to the jury with regard to the NJFPA statutory defense. The District Court accurately stated that VOA/AOA cannot be held responsible under the NJFPA if Coast did not substantially comply with the franchise agreement. And we find that jury question 6 did not misstate the law in asking "did Defendant's (sic) prove by a preponderance of the evidence that Plaintiff failed to substantially comply with requirements of the Franchise Agreement?"

B. The Sufficiency of the Evidence.

At trial, VOA/AOA offered evidence that Coast failed to substantially comply with its obligations under the franchise agreements in two ways. First, Coast failed to maintain the required financial arrangements for the purchase of new vehicles. Second, Coast made material misrepresentations about its financial ability when it applied to become a dealer. Coast argues that the verdict as to Coast's substantial noncompliance on VOA/AOA's first ground was against the weight of the evidence as a matter of law because Coast's method of purchasing vehicles during the bankruptcy period was found by the Appellate Division of the New Jersey Superior Court to be substantially compliant.

Our review of a jury's verdict is limited to determining whether some evidence in the record supports the jury verdict. As VOA/AOA correctly noted, jury question 6 did not require the jury to specify which one of the two bases for the defense they relied on. For our purposes we need only find the evidence sufficient as to one of the proffered bases. We agree with VOA/AOA that the New Jersey Superior Court's

statement in the context of a preliminary injunction proceeding has no bearing on the facts adduced at trial in this case, and we find that there is sufficient evidence supporting VOA/AOA's theory that Coast breached the franchise agreement by failing to maintain an adequate floor plan for purchasing new vehicles.

But even assuming that Coast was substantially compliant with regard to its method of purchasing vehicles, we find the evidence is sufficient to support the verdict based on Coast's substantial noncompliance in materially misrepresenting its financial ability in the dealer application. We note that Coast does not offer any argument with regard to the insufficiency of the factual evidence on the material misrepresentation ground. Coast only contends that such a "breach" was not material. We disagree. Under § 56:10-6, a franchisor may reject a dealership's application to transfer a franchise based on lack of financial ability of the prospective transferee. As in transfer of dealership cases, the prospective franchisee's financial ability is a key factor in the franchisor's decision to grant a dealership in the first instance. Ensuring that a prospective dealer has the necessary financial resources to make the franchise succeed ultimately protects the trade name, image, and good will of the franchisor. See A*merada Hess Corp. v. Quinn*, 362 A.2d 1258, 1266 (N.J. Super. 1976) (defining substantiality of noncompliance in terms of its effect or potential effect on the franchisor's trademark, trade name, image, and good will).

Here, Tamim Shansab and Nasir Shansab represented on the dealer application that their personal investments of $1.6 million and $400,000 respectively were unencumbered. No-

where did they disclose that the money actually came from investors in Japan. In a separate agreement with these investors, Tamim Shansab agreed to repay $1.7 million and to grant the investors a beneficial ownership interest in the dealership. VOA/AOA relied on Shansab's representations of his financial ability and those representations were central to VOA/AOA's decision to grant the dealership to Coast. Shansab's failure to disclose that the money he promised was not his and that investors wholly unknown to VOA/AOA had an ownership interest in the dealership constituted a material breach of the express terms of the dealership application. Thus, the evidence was sufficient for the jury to find under § 56:10-9, that Coast failed to substantially comply with the franchise dealership application.

Turning to the Dealers' Act claim, we find that, taken as a whole, all of the District Court's jury instructions regarding the Dealers' Act claim, including the charge on good faith, accurately stated the law, and that there was sufficient evidence to support the jury's finding that VOA/AOA's conduct did not constitute "coercion, intimidation, or threats of coercion or intimidation." 15 U.S.C. § 1221(e). We have held that evidence that a franchisor advanced its own interests and urged compliance with franchise obligations, without more, does not constitute coercion under the Dealers' Act. *General Motors Corp. v. New A.C. Chevrolet, Inc.*, 263 F.3d 296, 326 (3d Cir. 2001). However, evidence that the franchisor's reliance on franchise obligations was pretextual or in bad faith may be sufficient to show coercion. Id. at 327. Although Coast asserts that it was VOA/AOA that pressured it to sell its franchise, Coast represented in bankruptcy proceedings that its inability to maintain adequate floor plan financing

caused it to conclude that it had to sell the dealership. The fact that the bankruptcy proceedings were a "going concern" to VOA/AOA does not itself indicate that VOA/AOA's reliance on franchise obligations was pretextual or in bad faith.

Nor did the District Court abuse its discretion in precluding the admission of evidence as to the allegedly coercive and intimidating actions of VCI employees. Coleman v. Home Depot, Inc., 306 F.3d 1333, 1341 (3d Cir. 2002) (standard of review). Coast failed to offer any evidence to show that the actions of VCI employees should be imputed to VOA/AOA.

We have thoroughly reviewed the remaining arguments on appeal and find them to be without merit.

The judgment of the district court will be affirmed. VOA/AOA's motion to expand the record is denied.

APPENDIX D – NOTICE OF APPEAL, FILED FEBRUARY 7, 2003

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

FILE NO. CV97-2601 (GEB)

COAST AUTOMOTIVE GROUP, LTD.
A Delaware Corporation,

Plaintiff,

v. NOTICE OF APPEAL

VW CREDIT, INC., a Corporation,
VOLKSWAGEN OF AMERICA, a Corporation,
AUDI OF AMERICA, a Corporation,
MARGE YOST, MICHAEL RUECKERT,
STEPHEN JOHNSON

Defendants.

Notice is hereby given that Coast Automotive Group, Ltd., plaintiff in the above named case, hereby appeals to the United States Court of Appeals for the Third Circuit from (a) that part of that judgment of the United States District Court, District of New Jersey, entered in this action on October 30, 2002 which entered judgment in favor of defendants VOA and AOA on plaintiff's claims tried by jury and all evidentiary and *in limine* issues raised at the time of trial and (b)

that order entered on November 8, 2001 denying plaintiff's motion for a new trial on plaintiff's claims tried by jury.

RICHARD S. MAZAWEY, ESQ.

BY: _____

Richard S. Mazawey, Esq. (RM9395)
1135 Broad St., Suite 211
Clifton, NJ 07013
(973-777-6401)
Attorney for Plaintiff,
Coast Automotive Group, Ltd.

Dated: February 7, 2003

APPENDIX E – ORDER FILED JANUARY 8, 2003

Coast Automotive Group, Ltd.,

Plaintiff,

Civ. No. 97-2601 (GEB)

v.

VW CREDIT, INC., a corporation, VOLKSWAGEN OF AMERICA, a corporation, AUDI OF AMERICA, a corporation, MARGE YOST, MICHAEL RUECKERT, and STEPHEN JOHNSON,

ORDER

Defendants.

IT APPEARING TO THE COURT that there is parallel action in this matter in the Superior Court of New Jersey, Law Division, Ocean County, entitled *VW Credit, Inc. v. Coast Automotive Group, Ltd., et al., v. VOA and AOA and John Leiphart,* OCN-L-11862-96 ("the Law Division action"); and

IT FURTHER APPEARING TO THE COURT that on October 17, 2002, after conducting a trial on the merits and considering the submissions of the parties, the Honorable Marlene L. Ford, J.S.C., issued a bench verdict ("the October 17, 2002 Verdict") and read into the record an oral decision in the Law Division action; a copy of the transcript has been provided to the Court; and

IT FURTHER APPEARING TO THE COURT that on December 16, 2002, Judge Ford entered judgment in the Law

Division action; a copy of the judgment has been provided to the Court; and

IT FURTHER APPEARING TO THE COURT that the claims asserted by Coast against VW Credit in this action are substantially identical to Coast's claims against VW Credit already litigated in the Law Division action; and

IT FURTHER APPEARING TO THE COURT that on November 4, 2002, the Court held a telephone conference call to determine whether the remaining claims pending against VW Credit, Marge Yost, Michael Rueckert and Stephen Johnson should be dismissed as moot in light of the attached Judgment entered in the Law Division; and

IT FURTHER APPEARING TO THE COURT that plaintiff Coast Automotive consents to the voluntary dismissal of all claims pending against VW Credit, Marge Yost, Michael Rueckert and Stephen Johnson in this Court and circulated a proposed form of order dismissing those claims without prejudice; and

IT FURTHER APPEARING TO THE COURT that on December 23, 2002, VW Credit, Marge Yost, Michael Rueckert and Stephen Johnson submitted certain objections and modifications to the proposed form of order; and the Court having considered the parties submissions; and for good cause pursuant to Fed. R. Civ. P. 41 (a)(2);

IT IS this 7th day of January, 2003, hereby;

ORDERED that plaintiff's claims against VW Credit, Marge Yost, Michael Rueckert and Stephen Johnson be and hereby are DISMISSED AS MOOT; and it is further

ORDERED that the Clerk of the Court shall mark this case closed.

GARRETT E. BROWN, JR., U.S.D.J

APPENDIX F – ORDER OF JUDGMENT, FILED DECEMBER 15, 2002

RICHARD S. MAZAWEY, ESQ.
1135 Broad Street, Suite 211
Clifton, NJ 07013
(973) 777-6401

Attorney for Defendants, Tamim Shansab, et al.

VW CREDIT, INC.,
Plaintiff,
v.
COAST AUTOMOTIVE GROUP, LTD., TAMIM SHANSAB, SHANSAB REALTY, INC., SHANSAB ENTERPRISES, INC., NASIR SHANSAB
Defendants,

v.
VOLKSWAGEN OF AMERICA, AUDI OF AMERICA AND JOHN LEIPHART

Third Party Defendants,
AND

ASPEN KNOLLS AUTOMOTIVE GROUP, L.L.C.

Intervenor

Superior Court of New Jersey
Ocean County: Law Division
Civil Action
Docket No. OCN-L-1162-96

ORDER OF JUDGMENT

THIS MATTER having been brought before the Court for a non-jury trial on the claims by and between VW Credit, Inc. and John Leiphart on the one hand and Coast Automotive Group, Ltd., ("Coast"), Tamim Shansab, Shansab Realty, Inc. ("Shansab Realty"), Shansab Enterprises, Inc. and Nasir Shansab on the other hand and the Court having conducted trial and received written proposed findings of facts, propsed conclusions of law and written closing argument from the parties, for the reasons set forth on the record by the Court on Thursday, October 17, 2002 and for good cause shown:

IT IS ORDERED that on this 16th day of December, 2002 judgment shall be entered in the following manner:

1. Plaintiff VW Credit's complaint with amendments thereto for foreclosure and/or monetary judgment against Shansab Realty, Coast Automotive Group, Tamim Shansab, Nasir Shansab and Shansab's Enterprises dismissed in its entirety with prejudice;

2. Defendant Nasir Shansab's motion for a directed verdict is hereby granted with prejudice, his prior alleged personal guaranty no longer being in effect;

3. Coast Automotive Group, Ltd., is hereby granted judgment against VW Credit on its claim of breach of contract, breach of duty of good faith and fair dealing and lender liability and is granted judgment in the amount of $810,000.00 in compensatory damages and $1,000,000.00 in punitive damages. Coast's Counterclaim and Third Party Complaint against VW Credit only and John Leiphart only for negligent su-

pervison, conversion, violation of New Jersey Law Against Discrimination and tortious interference with prospective economic advantage are dismissed with prejudice;

4. Post-judgment interest shall accrue as set forth in R. 4:42-11 and shall be paid with the judgment amounts set forth in paragraph 3 above. Pre-judgment interest calculated at the rate set forth in the notes following Rule 4:42-11 January 16, 1996 to the date of entry of this judgment in the amount of _____ on compensatory only be paid with the judgment amounts set forth in paragraph 3 above [as per Schedule A]

5. A copy of this Order shall be served upon all parties within 7 days of entry thereon.

Dated: December 16, 2002

_____

Hon. Marlene L. Ford, J.S.C.

APPENDIX G – JUDGMENT, FILED OCTOBER 30, 2002

COAST AUTOMOTIVE GROUP, LTD.

Plaintiff

v.

VW CREDIT, INC., a corporation, VOLKSWAGEN OF AMERICA, a corporation, AUDI OF AMERICA, a corporation, MARGE YOST, MICHAEL RUECKERT, and STEPHEN JOHNSON,

Defendants.

Civ. No. 97-2601 (GEB)

JUDGMENT

This matter having come before the Court on a non-jury trial as to defendants' equitable fraud counterclaim and a trial by jury as to plaintiff's claims; and the issues having been tried and the jury having rendered its verdict on plaintiff's claims; and the Court having heard and considered evidence presented by the parties; and the Court having considered the pre and post-trial submissions of the parties; and for the reasons set forth in the Memorandum Opinion filed in the above-captioned matter which constitutes this Court's findings and fact and conclusions of law on the counterclaim pursuant to Fed. R. Civ. P. 52; and pursuant to Fed. R.Civ. P. 58; and for good cause shown;

IT IS this 28th day of October, 2002 hereby;

ORDERED AND ADJUDGED that judgment by special interrogatories be entered on plaintiff's claims in favor of defendants, Volkswagen of America and Audi of America and against the plaintiff, Coast Automotive;

ORDERED AND ADJUDGED that judgment entered on defendants' equitable fraud counterclaim in favor of the plaintiff and against the defendants.

GARRETT E. BROWN, JR. U.S.D.J.

APPENDIX H – JURY VERDICT SHEET, FILED SEPTEMBER 12, 2001

COAST AUTOMOTIVE GROUP, LTD., a Delaware Corporation,

Plaintiff, Civil Action No. 97-2601 (GEB)

vs. Civil Action

VW CREDIT, INC., a Corporation, VOLKSWAGEN OF AMERICA, a Corporation, AUDI OF AMERICA, a Corporation, MARGE YOST, MICHAEL RUECKERT, STEPHEN JOHNSON,

Defendants.

JURY VERDICT SHEET

PART A

Automobile Dealers' Day in Court Act

1. Do you find that Plaintiff proved by a preponderance of the evidence that Defendants failed to make a fair and equitable allocation of motor vehicles to Plaintiff?

Yes: _____X_____

No: _____

If your answer to questions 1 is yes, proceed to question 2. If your answer is no, do not answer question 2, go on to Part B.

2. Do you find that Plaintiff proved by a preponderance of the evidence that Defendants' conduct was an attempt to coerce and intimidate Plaintiff into surrendering or selling its Volkswagen and Audi franchises?

   Yes: _____

   No: _____ X _____

If your answer to question 2 is yes, proceed to question 3. If your answer is no, do not answer question 3, go on to Part B.

3. If your answers to questions 1 and 2 are both yes, do you find that Plaintiff proved that it suffered compensatory damages as a result of Defendants conduct? N/A

   Yes: _____

   No: _____

4. If your answers to questions 1 and 2 and 3 are all yes, do you find that Plaintiff proved by a preponderance of the evidence that it is entitled to punitive damages? N/A

   Yes: _____

   No: _____

PART B

The New Jersey Franchise Practices Act

5. Do you find that Plaintiff proved by a preponderance of the evidence that defendants violated the New Jersey Franchise Practices Act in their allocation of vehicles to Plaintiff as I have explained that act to you?

   Yes: _____X_____

   No: _____

6. If your answer to 5 is yes, did Defendant's prove by a preponderance of the evidence that Plaintiff failed to substantially comply with requirements of the Franchise Agreement?

   Yes: _____X_____

   No: _____

If your answer to 5 is yes and 6 is no, answer question 7. If your answer to 6 is yes, proceed to Part C and do not answer question 7.

7. Do you find that Plaintiff proved by a preponderance of the evidence that Plaintiff suffered compensatory damages as a result of Defendant's conduct? N/A

   Yes: _____

   No: _____

8. If your answer to question 7 is yes, do you find that Plaintiff has proved by a preponderance of the evidence that it is entitled to punitive damages? N/A

Yes: _____

No: _____

PART C

Damages

9. Compensatory Damages; If your answer to either or both of questions 3 and 7 is yes, what is the amount of compensatory damages which you find Plaintiff has proven by a preponderance of the evidence? N/A

$_____

10. Punitive Damages; If your answer to either or both of questions 4 and 8 is yes, what is the amount of punitive damages which you find Plaintiff has proven by a preponderance of the evidence?

$ _____

_____

FOREPERSON

APPENDIX I – ORDER FILED NOVEMBER 8, 2001

Richard S. Mazawey, Esq.
1135 Broad Street, Suite 211
Clifton, NJ 07013
(973) 777-6401
Attorney for Plaintiff, Coast Automotive Group, Ltd.
RSM9395

William B. Cummings, Esq.
112 South Pitt Street
Alexandria, VA 22314
(703)-836-7997
Attorney for Plaintiff, Coast Automotive Group, Ltd.
WC1248

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

COAST AUTOMOTIVE GROUP, LTD. d/b/a/ TSE MOTOR CARS, a Delaware Corporation,

Civil Action No. 97-2601 (GEB)

Plaintiff,

v. ORDER

VW CREDIT, INC., a Corporation, VOLKSWAGEN OF AMERICA, a Corporation, AUDI OF AMERICA, a Corporation, MARGE YOST, MICHAEL RUECKERT, STEPHEN JOHNSON,

Defendants.

ORDER

THIS MATTER having been opened to the Court by the plaintiff Coast Automotive Group, Ltd. by and through their counsel the Law Offices of Richard S. Mazawey (Geoffrey J. Hill appearing) and The Law Offices of William B. Cummings, P.C. (William B. Cummings appearing) on a motion for a new trial, *inter alia,* and the defendants Volkswagen of America and Audi of America having opposed said application and the Court, having considered the submissions of the parties and the argument of counsel and for good cause shown for the reasons states on the record:

IT IS on this 7th day of November 2001

ORDERED that the motion for a new trial is hereby denied in its entirety;

ORDERED that a copy of this Order shall be served upon all counsel within 10 days of entry thereon;

APPENDIX J – TRANSCRIPT OF TELEPHONE CONFERENCE DATED APRIL 5, 1999

Coast Automotive Group, Ltd.,
Plaintiff,
vs.

Volkswagen of America
Defendant,

Case No. 97cv2601(GEB)
402 East State Street
Trenton, NJ 08608

April 5, 1999

TRANSCRIPT OF TELEPHONE CONFERENCE BEFORE HONORABLE GARRETT E. BROWN, JR. UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Plaintiff. Richard S. Mazawey, Esq.
1135 Broad Street
Clifton, NJ 07013

For the Defendant: Capehart & Schacter
By: Mary Ellen Shetter, Esq.
William E. Reifsteck, Esq.
8000 Midlantic Drive, #300
Mt. Laurel, NJ 08054

For Volkswagen Credit: James Daniels, Esq.

Audio Operator: Christopher Wright

Transcript recorded by electronic sound recording,
transcript produced by transcription services.

MR. REIFSTECK: Judge, the notice of termination indicates that all of the dealers are required to have a wholesale line of credit. There's a 90 – the letter is a 90-day notice that he must acquire a wholesale line of credit within 90 days, otherwise the franchises will be terminated.

THE COURT: Your position is not that if he were to lose the present case that that would act as a preclusion of any claim he may bring under this latest notice, is it?

MR. REIFSTECK: No, it has no relationship whatsoever. It's just simply an obligation under the dealer agreement to have a wholesale line of credit, and he's given notice that if he does not do it within 90 days then –

THE COURT: I'll deny a request to amend at this point. Everything has to come to a conclusion at one point.

APPENDIX K – PLAINTIFF'S PROPOSED JURY INSTURCTION NO. 12

Plaintiff's Proposed Jury Instruction No. 12

The New Jersey Franchise Practices Act also prevents franchisors from indirectly terminating franchises. As such, a franchisor is prohibited from attempting to drive a franchisee out of business. In this case, Coast alleges that VOA and AOA so egregiously impeded its ability to perform that the attempted to "constructively terminate" its franchises. It is for you to determine whether or not VOA and AOA damage Coast in an attempt to drive it out of business.

See Carlo C. Gelardi, Corp. v. Miller Brewing Company, 502 F.Supp. 637 (D.N.J. 1980)

APPENDIX L – PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 13

Plaintiff's Proposed Jury Instruction No. 13

The New Jersey Franchise Practices Act requires that franchisors comply with the covenant of good faith and fair dealing which is implicit in every contract. You should be aware that this duty to act in good faith is different than the duty to act in good faith under the Automobile Dealers' Day in Court Act. As a result, The New Jersey Franchise Practices Act prohibits manufacturers from imposing adverse conditions upon their francisees which amount to unreasonable standards of performance. In the event no single action of a franchisor in a particular lawsuit violates The New Jersey Franchise Practices Act, a franchisor may still violate the Act through the cumulative effect of its actions.

See Carlo C. Gelardi, Corp. v. Miller Brewing Company, 502 F. Supp. 637 (D.N.J. 1980)

APPENDIX M – PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 14

Plaintiff's Proposed Jury Instruction No. 14

1. Good Faith and Fair Dealing

The law requires that each party to a contract must act in good faith and deal fairly with the other party in performing or enforcing the terms of the contract. This requirement of good faith and fair dealing must be maintained and exhibited in the parties' performance of their obligations throughout the tenure of the contract. This is not unlike the covenant in a marriage contract "in sickness and in health…"

The implied agreement is part of the contract, just as though the contract expressly states this good faith and fair dealing requirement.[4] To act in good faith and deal fairly, the parties must act honestly toward each other when performing or enforcing a contract.[5] The party shall not do any-

---

[4] *See Sons of Thunder, Inc. v. Borden, Inc.*, 148 N.J. 396 (1997); *Pickett v. Lloyd's*, 131 N.J. 457, 467 (1993); *Onderdonk v. Presbyterian Homes*, 85 N.J. 171, 182 (1981); *Bak-A-Lum Corp. v. Alcoa Bldg. Prods. Inc.*, 69 N.J. 123, 129-3- (1976); *Ass'n Group Life, Inc. v. Catholic Ware Veterans*, 61 N.J. 150, 152 (1972); *Palisades Properties, Inc. v. Brunetti*, 44 N.J. 117, 130 (1965)

[5] The U.C.C. addresses the issue. "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." *N.J.S.A.* 12A:1-203. Good faith is generally defined as "honesty in fact in the conduct or transaction concerned." *N.J.S.A.*. 12A:1-201(19). "Good faith in the case of a merchant means honesty in fact and the observance of reasonable commer-

thing that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.[6]

The implied covenant of good faith and fair dealing may not override an expressly granted right under the contract. For example, an implied covenant of good faith and fair dealing may not override an express provision in the contract giving one party the right to terminate, and the party's motive in terminating under such circumstances may be irrelevant.[7] However, a party may not breach the duty of good faith and fair dealing in the performance of the contract.[8] A

---

cial standard of fair dealing in the trade." *N.J.S.A.* 12A:2-103(b). Although the U.C.C. governed in *Sons of Thunder, Inc.*, the Court stated that the common law duty also influenced the Court's analysis. *Sons of Thunder, Inc. v. Borden, Inc., supra,* 148 N.J. at 420-21.

[6] *Sons of Thunder, Inc. v. Borden, Inc. supra,* 148 N.J. at 420.

[7] *See Sons of Thunder, Inc. v. Borden, Inc., supra,* 148 N.J. at 417 ("We agree . . . that the implied covenant of good faith and fair dealing cannot override an express termination clause."); *id* at 423 (" [W]here the contractual right agree with that view of the law.") *See also Prudential Stewart Realty v. Sonnenfeldt,* 285 N.J. Super. 106, 110 (App. Div. 1995) (party does not breach implied duty of good faith and fair dealing, in exercising contractual right to terminate after six months, regardless of party's motives) *certif. denied,* 143 N.J. (1996); *Karl's Sales & Service, Inc. v. Gimbel Bros., Inc.,* 249 N.J. Super. 487, 495 (App. Div.), *certif. denied,* 127 N.J. 548 (1991)

[8] *Sons of Thunder, Inc. v. Borden, Inc., supra,* 148 N.J. at 419 (stating that although the duty does not trump an express termination clause, the court still "must determine whether...[party] performed its obligations in good faith."); *id* at 423-23 (stating that

party who fully complies with express contract provision may still breach the implied duty in the performance of the contract.[9] Thus, a party who is expressly entitled to terminate a contract must still give an honest effort until termination actually takes place.[10]

It is for you to determine whether or not the parties gave an honest effort in the performance of their obligations under the dealer agreement.

Adapted from New Jersey Institute for Continuing Legal Education, Model Jury Charges, Charge 4.10 "Good Faith and Fair Dealing" (2000 Edition).

---

party with express termination right must still perform contract in good faith and fairly.)

[9] *Id.* at 422-23.

[10] *Id.* at 421-23.

APPENDIX N – PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 12

Plaintiff's Proposed Jury Instruction No. 12

The New Jersey Franchise Practices Act also prevents franchisors from indirectly terminating franchises. As such, a franchisor is prohibited from attempting to drive a franchisee out of business. In this case, Coast alleges that VOA and AOA so egregiously impeded its ability to perform that they attempted to "constructively terminate" its franchises. It is for you to determine whether or not VOA and AOA damaged Coast in an attempt to drive it out of business.

See Carlo C. Gelardi, Corp. v. Miller Brewing Company, 502 F.Supp. 637 (D.N.J. 1980)

APPENDIX O – PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 13

Plaintiff's Proposed Jury Instruction No. 13

The New Jersey Franchise Practices Act requires that franchisors comply with the covenant of good faith and fair dealing which is implicit in every contract. You should be aware that this duty to act in good faith is different that the duty to act in good faith under the Automobile Dealers' Day in Court Act. As a result, The New Jersey Franchise Practices Act prohibits manufacturers from imposing adverse conditions upon their franchisees which amount to unreasonable standards of performance. In the event no single action of a franchisor in a particular lawsuit violates The New Jersey Franchise Practices Act, a franchisor may still violate the Act through the cumulative effect of its actions.

See Carlo C. Gelardi, Corp. v. Miller Brewing Company, 502 F.Supp. 637 (D.N.J. 1980)

APPENDIX P- LETTER TO HONORABLE GARRETT E. BROWN, U.S.D.J. FROM GEOFFREY HILL, DATED SEPTEMBER 9, 2001

Hon. Garrett E. Brown, U.S.D.J.
September 9, 2001
Page 5

because it was on finance hold VW Credit, the jury must also be entitled to consider whether or not VOA's and AOA's conduct frustrated and created adverse circumstances for Coast. How convenient for VOA and AOA not to ship Coast any vehicles for months at a time and then to argue that Coast ought to have implemented an alternative floor-plan source? If the wholesale line of credit issue is to be submitted to the jury, the jury ought to be able to consider the totality of circumstances, which includes that N.J.S.A. 56:10-7(e) requires that VOA and AOA refrain from imposing adverse and unreasonable conditions upon Coast.

Again, the issue is not "black and white" as VOA and AOA suggest.

Automobile franchisees obtain damages under N.J.S.A. 56:10-29. The provision was effective on or about November 12, 1985, some 14 years after N.J.S.A. 56:10-9 was enacted. N.J.S.A. 56:10-29 sets forth that "A motor vehicle franchisee may bring an action against the motor vehicle franchisor which has granted its franchise, or any other person, in the Superior Court to enjoin violation of this act and to recover, where appropriate, any damages sustained by the francisee as a result of a violation if this act. The franchisee, if successful, shall also be entitled to coasts of the action, including, but not limited to, reasonable attorneys fees."

VOA's and AOA's arguments that Coast is non-compliant are properly preserved as factual issues. That is to say, VOA and AOA have argued to the jury that Coast was "in violation" of its dealer agreements. The jury will consider whether or not whether or not Coast's claims for damages are as a result of the intentional acts of VOA and AOA or whether Coast's conduct is the cause of the damages it claims. The jury will adjust Coast's damage aware, if any, to reflect how much damage it feels was caused by VOA's and AOA's actions against Coast.

As a matter of federal law and federal pre-emption, VOA and AOA could not terminate Coast's franchises while it was in Chapter 11 nor could they overtly refuse to do business with Coast. The jury has the right to consider VOA's and AOA's conduct in light of their mandatory obligation to give Coast a fair and equitable allocation of vehicles. VOA and AOA were requires to sell vehicles to Coast so that Coast could re-sell them to the public.

In order to recover, Coast is required to prove that VOA's and AOA's actions were the factual cause and legal cause of its harm. VOA and AOA have the same burden in their defenses. VOA and AOA have not shown one single example, however, of an instance where N.J.S.A. 56:10-9 has been used as an absolute bar in the manner in which VOA and AOA propose to use it in this instance.

In the present posture, collateral issues of contract construction are being thrown up to the jury for consideration. Rather, it is jury's providence to determine the facts of the case.

APPENDIX Q – LETTER (CONTINUED) TO HONORABLE GARRETT E. BROWN, U.S.D.J. FROM GEOFFREY HILL, DATED SEPTEMBER 9, 2001

Hon. Garrett E. Brown, U.S.D.J.
September 9, 2001
Page 6

As Coast has suggested to this Court, most of the provisions of The New Jersey Franchise Practices Act have Noting to do with "termination, cancellation of non-renewal of franchises." It is more than 30 paragraphs and subparagraphs deal with warranty reimbursement, relocation of franchises, repurchase of parts inventories, successorship of franchises within families, jury trial waivers, choice of law and forum selection clauses. To the extent that N.J.S.A. 56:10-9 is applicable to any section of The New Jersey Franchise Practices Act, its application must be proportional and it must be consistent with Amerada Hess, which makes it clear that violations of federal and state law constitutes substantial noncompliance, not technical defects or omissions.

Coast respectfully submits that the jury cannot be instructed on N.J.S.A. 56:10:-9 as an absolute bar to Coast's claims. The law is clear regarding the type of conduct that constitutes a "substantial non-compliance."

56:10-9 does not claim that a franchisee must be in compliance with all of the franchise requirements nor in literal compliance with any of the franchise requirements.

VOA and AOA are asking this Court to put an incorrect abstraction before the jury which will prejudice Coast's right to a fair determination based upon the evidence of the record.

Coast respectfully requests that the Court instruct the jury consistent with Amerada Hess and Coast's request herein.

Respectfully submitted,

GEOFFREY J. HILL

GJH/hs:
cc w/encls.:
William D. Reifsteck, Esq.
William B. Cummings, Esq.

APPENDIX R-TRANSCRIPT OF TRIAL, DATED SEPTEMBER 5, 2001

Coast Automotive Group, Ltd.,
Plaintiff,
vs.

Volkswagen of America
Defendant,

Case No. 97cv2601(GEB)
402 East State Street
Trenton, NJ 08608

September 5, 2001 9:18 a.m.

TRANSCRIPT OF TRIAL
BEFORE HONORABLE GARRETT E. BROWN, JR.
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Plaintiff:

The Law Office of Richard S. Mazawey
Richard S. Mazawey, Esq.
1135 Broad Street
Clifton, NJ 07013

William B. Cummings, Esq.
Alexandra, Virginia

For the Defendant:

Capehart & Schacter
Mary Ellen Shetter, Esq.
William E. Reifsteck, Esq.
8000 Midlantic Drive, #300
Mt. Laurel, NJ 08054

For Volkswagen Credit: James Daniels, Esq.
Audio Operator: Christopher Wright

Transcript recorded by electronic sound recording,
transcript produced by transcription services.

The problems that happened at Coast were all the result of Coast selling cars out of trust, not having enough money, filing in bankruptcy. As you'll see, the minute they got out of bankruptcy, they started to get a lot more cars. Their problem wasn't because Volkswagen and Audi were trying to put them out of business.

"Look. As long as the Volkswagen Credit matter is going on. It's not going to change. My hands are tied." You know, "until this situation is handled, there just won't be any cars coming."

APPENDIX S -TRANSCRIPT OF TRIAL, DATED SEPTEMBER 10, 2001

Coast Automotive Group, Ltd.,
Plaintiff,
vs.

Volkswagen of America
Defendant,

Case No. 97cv2601(GEB)
402 East State Street
Trenton, NJ 08608

September 10, 2001 8:47 a.m.

TRANSCRIPT OF TRIAL
BEFORE HONORABLE GARRETT E. BROWN, JR.
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Plaintiff:

William Cummings, Esq.
Geoffrey J. Hill, Esq.
1135 Broad Street
Clifton, NJ 07013

For the Defendant:

Capehart & Schacter
William E. Reifsteck, Esq.
8000 Midlantic Drive, #300
Mt. Laurel, NJ 08054

Audio Operator:

Christopher Wright

Transcript recorded by electronic sound recording,
transcript produced by transcription services.

All right. And would you say that when you got there Coast was the kind of dealership you wanted to encourage?

Yes. They treated their customers well and they had a big facility and they were in the right market.

Did you ever ask Mr. Shansab how much money he had available to buy cars if you could deliver them to him?

No.

I understand that, Mr. Domke. Having made that decision, Mr. Domke, you had opportunities to assist it even further by suggesting other ways they could have provided more cash to you to buy more cars so you can get them more cars and get them back to the point where they were before, correct?

I guess I wasn't creative enough to think of that.

Did they think of it and tell you that they had money and could write you a check if you bring them more cars, Mr. Domke?

No.

[Domke:]

> [With respect to Coast] – the first thing I would state is that they did an excellent job in taking care of the customers. We have two customer satisfaction indexes in our business, service satisfaction and sales satisfaction and [Coast] always did an excellent job of taking care of both – their customers and as a result, they always had excellent scores in those two gauges of those performances.

1135a In 8-14 (emphasis supplied.)

APPENDIX T -TRANSCRIPT OF TRIAL, DATED SEPTEMBER 11, 2001

Coast Automotive Group, Ltd.,
Plaintiff,
vs.

Volkswagen of America
Defendant,

Case No. 97cv2601(GEB)
402 East State Street
Trenton, NJ 08608

September 11, 2001

TRANSCRIPT OF TRIAL
BEFORE HONORABLE GARRETT E. BROWN, JR.
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Plaintiff:

Richard S. Mazawey, Esq.
1135 Broad Street
Clifton, NJ 07013

William B. Cummings, Esq.
Alexandria, Virginia

For the Defendant:

Capehart & Schacter
By: Mary Ellen Shetter, Esq.
William E. Reifsteck, Esq.
8000 Midlantic Drive, #300
Mt. Laurel, NJ 08054

Audio Operator:

Christopher Wright

Transcript recorded by electronic sound recording,
transcript produced by transcription services.

BY MR. CUMMINGS:

"In your judgment can a dealer – an Audi dealer acquire cars with their own money?

Yes, they can.

Can dealers purchase their vehicles?

Yes, they can.

Is that a proper method of purchase?

Yes, they can.

With respect to the dealer's ability to purchase or acquire cars with their own money, were there any other dealers to your knowledge in your region in the district that you operate in for Audi that acquire vehicles with their own money?

Not to my knowledge, no.

Did Coast/TSE do that?

Yes."

BY MR. CUMMINGS:

"Okay. Did Coast have a financial facility to pay for vehicles that were allocated to it?

Yes, via certified check.

And did Coast do so?

Yes.

When cars were allocated?

Yes. No. Coast -- it is not Coast – its TSE' did so prior to their vehicles being formally allocated to them.

But they paid by certified check?

They paid by certified check."

MR. CUMMINGS: Turn to page 63 starting at line 11.

APPENDIX U – TRANSCRIPT OF TRIAL, DATED SEPTEMBER 12, 2001

Coast Automotive Group, Ltd.,
Plaintiff,
vs.

Volkswagen of America
Defendant,

Case No. 97cv2601(GEB)
402 East State Street
Trenton, NJ 08608

September 12, 2001 8:59 a.m.

TRANSCRIPT OF TRIAL
BEFORE HONORABLE GARRETT E. BROWN, JR.
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Plaintiff:

Richard S. Mazawey, Esq.
1135 Broad Street
Clifton, NJ 07013

William B. Cummings, Esq.
Alexandria, Virginia

For the Defendant:

Capehart & Schacter
By: Mary Ellen Shetter, Esq.
William E. Reifsteck, Esq.
8000 Midlantic Drive, #300
Mt. Laurel, NJ 08054

Audio Operator:

Christopher Wright

Transcript recorded by electronic sound recording,
transcript produced by transcription services.

In addition, the coercion or intimidation must be actual. That is, the mere fact that a dealer feels it has been coerced or intimidated is not sufficient. It's for you to decide, on the basis of all the circumstances disclosed by the evidence, whether the defendant's conduct reached the level of actual coercion or intimidation, or threats thereof.

If you find in favor of the plaintiff, you will have to consider the issue of the plaintiff's damages. Plaintiff seeks both compensatory and punitive damages. I'll instruct you on damages later on. Damages is the third section of this charge. You'll get that in a few minutes.

Since Coast has alleged, in this lawsuit, that among other conduct, VOA and AOA intentionally and wrongfully withheld Coast's fair share allocation of motor vehicle inventory in an attempt to force Coast to surrender its Volkswagen and Audi franchises. It's for you to determine 1) whether or not VOA and AOA did, in fact, deprive Coasts of its fair share allocation of vehicles; and 2) whether or not VOA and AOA's conduct toward Coast reached a level of actual attempted coercion or intimidation.

We'll move on, now, to Coast's second claim for damages. This one is under the New Jersey Franchise Practices Act. That act governs the "termination, cancellation, or non-renewal of franchises" in the State of New Jersey. In order to terminate a franchise, that is a dealer agreement here, a franchisor, which would be the manufacturer here, must issue a letter of termination which clearly sets forth the specific grounds for termination. The franchisee, that is the dealer, may then seek relief in Court to stop the termination. In order for the franchisor to prevail in Court, the franchisee must be deemed by the Court to be substantially non-compliant with its obligations as a franchisee. Substantial

non-compliance cannot be based upon a mere technical defect or omission by the franchisee, but rather must effect the trade name of the franchisor.

In this lawsuit, it's agreed that VOA and AOA did not take steps to formally terminate Coast's Franchise pursuant to the statute. Furthermore, while Coast was under Chapter 11 protection of the Bankruptcy Code, Coast's franchises were protected, as a matter of law, by the Automatic Stay Doctrine. That doctrine, among other things, prevents parties from breaking or terminating contracts with a party that is in Chapter 11 of the bankruptcy Code.

Volkswagen and Audi agree that they could not cease to do business with Coast without seeking relief from the Bankruptcy Court. Their position is that they did not seek to terminate Coast, or cease to do business with Coast. The New Jersey Franchise Practices Act also prevents franchisors from terminating franchises. As such, a franchisor is prohibited from attempting to drive a franchisee out of business. In this case, Coast alleges Volkswagen and Audi so egregiously impeded its ability to perform that they attempted to "constructively terminate" its franchises. Defendants deny this. It's for you to determine whether or not Volkswagen and Audi damaged Coast in attempt to drive it out of business.

A manufacturer or distributor may not be held liable or responsible under the New Jersey Franchise Practices Act if its dealer has not substantially complied with the provisions of the franchise agreement. If Audi and Volkswagen prove, by a preponderance of the evidence, that plaintiff Coast failed to substantially comply with the provisions of the franchise agreement between plaintiff and defendants, then Volkswagen and Audi cannot be held liable under law. That's the affirmative defense that I talked about before.

And as to this, Volkswagen and Audi have the burden of proof by a preponderance of the credible evidence, as I told you before.

The law is not designed to protect dealers who willfully or deliberately violate reasonable terms of their franchise agreements. Under the New Jersey Franchise Practices obligation under the agreement may recover against a manufacturer for violation of the act if they have faithfully and honestly endeavored to perform their contract in all material and substantial particulars, so that their rights, compensation may not be forfeited by reason of mere technical or unimportant omissions or defects. It's for you to determine whether or not the defendants have proven, by a preponderance of the evidence, that plaintiff was not in substantial compliance with the agreements.

The New Jersey act requires the parties comply with the covenant of – it should be in good faith, counsel. I see that there's a typo there. Good faith and fair dealing, which is implicit in every contract. Good faith under this law is defined differently than it is under the Dealer's Day in Court Act, the Federal act. The New Jersey act prohibits manufacturers from imposing adverse conditions upon their francisees, which amount to unreasonable standards of performance.

Plaintiff contends that defendant did not comply with Article 8, Paragraph 4 of the Standard provision. This paragraph states as follows; Dealer recognizes that certain authorized products may not be available in sufficient supply from time to time because of factors such as product importation, consumer demand, component shortages, manufacturing constraints, government regulations, or other causes. Distributor will endeavor to make a fair and equitable alloca-

tion and distribution of authorized products to it. In the event no single act of a franchisor in a particular case violates the New Jersey Franchise Practices Act, the franchisor may still violate the act through the cumulative effect of its actions." Defendants content that Volkswagen and Audi franchise agreements require all dealers to maintain specific financial accommodation for the purchase of motor vehicles, and that plaintiff did not do so. Section 3, capitalization C of the Volkswagen Dealer Operating Standards specifically provides as to wholesale lines of credit, a separate wholesale line of credit for the sale of new Volkswagen vehicles shall be maintained with the retailers, plaintiff's financial institution, and in an amount determined by Volkswagen U.S. A current written letter of commitment in a form satisfactory to Volkswagen U.S. will be provided to Volkswagen U.S. by the retailers financial institution. The retailer's financial institution will accommodate the vehicle drafting procedures employed by Volkswagen U.S. The Audi franchise agreement has a similar requirement.

The act in good faith and deal fairly, the parties must act honestly toward each other when performing or enforcing the contract. The parties shall not do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.

The implied covenant of good faith and fair dealing may not override an expressly granted right under the contract. For example, an implied covenant of good faith and fair dealing may not override an express provision of the contract, giving one party the right to terminate, and the party's notice in terminating under such circumstances may be irrelevant. However, a party may not breach the duty of

good faith and fair dealing in the performance of the contract.

A party who fully complies with the express contract provisions may still breach the implied duty in the performance of the contract. Thus, a party who is expressly entitled to terminate a contract must still give an honest effort until termination actually takes place. It's for you to determine whether or not the parties gave an honest effort in the performance of their obligations under the dealer's agreement.

If you find in favor of the plaintiff, you will then have to consider the issue of plaintiff's damages. In that regard, just award the plaintiff an amount of money that would fairly and adequately compensate him for the damages as shown -- the evidence shows plaintiff has sustained, and is reasonably certain to sustain in the future as a result of the unfair deprivation of vehicles allocated to plaintiff during the period of time from December 15th, '95, until September 18th, '97. The plaintiff also seeks punitive, as well as compensatory damages, under the New Jersey statute.

I will now move on to the remaining portions of the instructions. We have Part 3, Damages, and Part 4, Duties as Jurors, and also a verdict sheet. I will discuss all of those with you right now. So, if you could just hand them out, this is the Damage section, and this is the Duties as Jurors section, and this is the verdict sheet section. And, once I've explained those, we'll take a short recess, and then you will hear from the attorneys. As I told you before, you will hear first from the defendant, and then last for the plaintiff, because the plaintiff bears the general burden of proof.

(Pause) (By VOA Counsel)

Now, the failure to have, in Volkswagen and Audi's opinion, the failure to have a wholesale line of credit was a

substantial material breach of the agreement between Volkswagen and Audi and Coast. And having, as you will go through your jury determination, when you find that Coast - - if you find that Coast failed to substantially comply with that agreement, then you are to find that there's a defense to the claims under the New Jersey Franchise Practices Act.

I think that there's no reason to have to worry about the damage aspect, because there was a material, substantial breach of the agreement by Coast in not having a floor plan, and everything flowed from that. If they had not lost their floor plan, we wouldn't be here today.

APPENDIX V – TRANSCRIPT OF HEARING, DATED SEPTEMBER 4, 2001

Coast Automotive Group, Ltd.,
Plaintiff,
vs.

Volkswagen of America
Defendant,

Case No. 97cv2601(GEB)
402 East State Street
Trenton, NJ 08608

September 4, 2001 1:57 p.m.

TRANSCRIPT OF HEARING
BEFORE HONORABLE GARRETT E. BROWN, JR.
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Plaintiff:

Richard S. Mazawey, Esq.
1135 Broad Street
Clifton, NJ 07013

William B. Cummings, Esq.
Alexandria, Virginia

For the Defendant:

Capehart & Schacter
By: Mary Ellen Shetter, Esq.
William E. Reifsteck, Esq.
8000 Midlantic Drive, #300
Mt. Laurel, NJ 08054

Audio Operator:

Christopher Wright

Transcript recorded by electronic sound recording,
transcript produced by transcription services.

THE COURT: They can say they felt that they were in breach. As to whether there actually was breach, that's a legal issue.

I'm going to deny it without prejudice if there's an assertion made by Volkswagen or Audi which you feel would require you to reassert this position. So I will deny that without prejudice.

That resolves the in limine motions.

MR. HILL: Your Honor, I believe there was one more. I apologize. But there was one more. With regard to - - Your Honor did address the floor plan issue as alleged breach of contract. Again, I think Your Honor distinguished between raising the floor plan issue as a factual or evidentiary issue saying Volkswagen might feel something as opposed to what a legal conclusion would be about.

THE COURT: Whether they were, in fact, in breach, of course, is an issue. What they could do with it as a result, of course, would be determined by the Bankruptcy Court because the estate is in bankruptcy and even if they asserted a clear breach, they'd have to go before the Bankruptcy Court.

MR. HILL: Correct. There was a similar in limine proposed by us which had to do with the alleged "misstatement," misstatements in the application. The reason being is I think there's a grossly huge difference between asserting the alleged misrepresentations, alleged misstatements, as part of a counterclaim for fraud. Which again, we have opposed on a legal basis setting forth that you just can't sue a franchise in the State of New Jersey under the common-law to rescind a franchise because the Franchise Practices Act governs who's a franchisee and who's not. But in any event, when it comes to the alleged misrepresentations, those were

first identified, if you will, by Volkswagen in August of 1999. They then moved to add counterclaims in the state and federal cases.

THE COURT: Yes.

MR. HILL: They never moved to terminate the franchises under the agreements. In other words, they never sent out notices of termination to attempt to terminate the franchises. Again, as I referred to before, until a contract is terminate, a party must perform their obligations in good faith. I can't see as a defense - -

THE COURT: They're not asserting termination, they're asserting rescission that that contract was void ab initio.

MR. HILL: I understand they were asserting rescission with all the attendant burdens under rescission. In other words, in clear and convincing evidence and all the things that one must do under rescission. They are also though, the seem to be in their papers, asserting misrepresentations as a legal defense to our affirmative damage claims. In other words, they're using it like a -- they're saying, well, we could have terminated you, but you're not terminated. I think again, that's an issue that's like the floor plan issue. I don't know how they're –

THE COURT: That's a defense to your claim, isn't it? There's no requirement that they assert the defense before you assert the claim.

MR. HILL: Well, they're asserting it as a defense, but I don't know how legally if can be a defense because we're alleging 1996 and 1997 causes of action. They have an alleged misstatement that they're citing in 1999 which at very best they can send out a notice of termination on which might look forward. I don't know how that can be used to

attempt to be a legal excuse to relieve them from liability in 1996 and 1997. So I don't think that that can be a question that's posed to the jury as an issue to decide. Has Coast breached its contract or has it made a misrepresentation and use that a defense to our damages claim.

Again, it can be considered, again taking into all my objections as far as the rescission claim, but it can be considered as part of their rescission claim because you have your burdens of clear and convincing evidence and so forth. But what they're trying to do is they're trying to get it in the back door as a defense to our damages claims when there is nothing about this alleged misrepresentation issue which give them a legal excuse or justification for not having given cars in 1996 and 1997. I don't know how that computes.

THE COURT: All right. I think the simple answer to that is the statute creates a defenses there and it does not say you must first have terminated, but it says it is a defense. So I'm not going to take away that statutory defense --

MR. HILL: I would respectfully --

THE COURT: You have my ruling. You may disagree with it.

MR. HILL: Yeah. If I could just, respectfully for the record, note for a moment. We would most respectfully disagree with that. That there must be some relationship between an alleged breach and an alleged cause of action, both as the nature of the facts of the two. In other words, like when you have a termination then you would argue against the termination that well, this party should be terminated because they're in breach of the contract. Here we're talking about allocation. There is no justification anywhere in law not to make available a certain amount of vehicles to a fran-

chisee. They can certainly suggest that we didn't have money to buy them or something like that.

But the New Jersey Franchise Practices Act would have absolutely no effect, no teeth if every time a franchisee alleged a cause of action for failure to provide inventory or, for example, in this courthouse Judge Mary Little Cooper back in December had a case where a group of Daimler Chrysler dealers had joined together under the auspices of New Jersey Car and were challenging Daimler Chrysler's warranty reimbursement procedures. Now, based upon the proposition further by Volkswagen and Audi, what Daimler Chrysler could do could look at all those franchisees and say if you're in breach of any single provision of your franchise agreement, you can't get your money back on your warranty account. That would make absolutely not sense at all. The Franchise Practices Act would have absolutely no teeth and all it would do is anytime a franchisee filed a lawsuit on any basis, that would just cause a case within a case because anything about the franchisee would be dredged up in an attempt to make some type of legal defense rather than a factual defense.

THE COURT: Thank you. In the context of a motion in limine, my ruling stands. I'll see you at nine o'clock tomorrow. Thank you.

(Court is adjourned)

* * * * *

CERTIFICATION

I, PATRICIA A. KONTURA, court approved transcriber, certify that the forgoing is a correct transcript from

the official electronic sound recording of the proceedings in the above-entitled matter.

PATRICIA A. KONTURA
J & J COURT TRANSCRIBERS, INC.

September 23, 2003

Supreme Court, U.S.
FILED
(2)
041737 MAY 26 2005
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

COAST AUTOMOTIVE GROUP LTD.,

Petitioner,

v.

VOLKSWAGEN CREDIT, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL APPENDIX

GEOFFREY J. HILL, ESQ.
N.U.S. Corporate Plaza
1 Maynard Drive, Suite 6
Park Ridge, NJ 07656
(201) 505-1033
Attorney for Petitioner

APPENDIX

Page

Supplemental Appendix – Memorandum Opinion, filed October 30, 2002 ..... 1a

SUPPLEMENTAL APPENDIX – MEMORANDUM OPINION, FILED OCTOBER 30, 2002

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Coast Automotive Group, Ltd. Plaintiff,	:	
v.	:	Civ. No. 97-2601 (GEB)
VW Credit Inc, a corporation Volkswagen of America, a corporation, Audi of America a corporation, Marge Yost Michael Rueckert, and Stephen and Stephen Johnson Defendants.	:	**MEMORANDUM OPINION**

BROWN, District Judge

This matter comes before the Court on a non-jury trial as to the equitable fraud counterclaim of defendants, Volkswagen of America and Audi of America's (collectively "VOA/AOA") seeking rescission of the franchise agreement with Coast Automotive Group, Ltd. ("Coast"). For the reasons discussed below, the Court enters judgment on the counterclaim in favor of the plaintiff.

I. BACKGROUND

The facts and procedural history of this case are discussed at length in the Court's prior opinions and will not be dis-

cussed here to except to the extent necessary to resolve the issues pending before the Court.

A. PROCEDURAL HISTORY

This matter has a tortured procedural history spanning multiple actions in both federal and state court. Coast has been an authorized retailer of Volkswagen and Audi cars since approximately August 1991. In or about December 1995, Coast's source of financing its inventory of cars, VW Credit, Inc. ("VCI"), withdrew its wholesale line of credit due to Coast's breach of the financing agreement and filed a verified complaint in the Superior Court of New Jersey, Law Division, against Coast, Tamim Shansab Enterprises, Inc., Shansab Realty, Inc., Tamim Shanshab, Nasir Shansab and Yama Shansab (the "Law Division Action"). Thereafter, Coast filed a bankruptcy petition seeking protection from its creditors under Chapter 11 of the Bankruptcy Code. In or about January 1997, Coast filed an adversary proceeding against VCI and VOA/AOA in the Bankruptcy Court. In May 1997, defendants moved in this Court to withdraw the reference from the Bankruptcy Court and proceed with the action here. The Court granted defendants' motion and withdrew the reference.

Plaintiff's original complaint in the federal action asserted sixteen separate counts against the defendants related to plaintiff's operation of a car dealership in Toms River, New Jersey. In August 1998, VOA/AOA moved for summary judgment on all sixteen counts in plaintiff's complaint, and plaintiff cross-moved for leave to amend the complaint to assert claims under the New Jersey Franchise Practices Act,

N.J., Stat. Ann. § 56:10-1, *et seq.*, and the federal Automobile Dealers' Day in Court Act, 15 U.S.C. §1221, *et seq.* The Court granted defendants' motion for summary judgment and also granted plaintiff's cross-motion.[1] On October 4, 1999, the Magistrate Judge granted VOA/AOA leave to assert a state law counterclaim seeking equitable rescission of the franchise agreement between VOA/AOA on the grounds that Coast's principals, Tamim and Nasir Shansab, made materially false statements to the defendants regarding the source of Coast's financing in obtaining the VOA/AOA franchise and false statements regarding Nasir Shansab's future involvement in the management of the Coast car dealership.

During the pendency of this action, in April 1998 Coast filed a third-party complaint in the Law Divisions Action against VOA/AOA, and, as the federal action, VOA/AOA counterclaimed against Coast for rescission of the franchise agreement. The Law Division entered an order preliminary enjoining VOA/AOA from terminating the franchise.

---

[1] In June 1999, VCI and the individual defendants, Marge Yost, Michael Rueckert and Stephen Johnson, filed a motion for summary judgment, which the Court granted by Memorandum Opinion and Order entered on October 6, 1999. VCI and the individual defendants the sought certification of the Court's October 6, 1999 Order as a final appealable order pursuant to Fed.R.Civ. P. 54(b), which the Court granted by Memorandum Opinion and Order entered on January 27, 2000. The United States Court of Appeals affirmed in part and reversed in part the grant of summary judgment in favor of VCI and remanded the matter to this Court. However, Coast's claims against VCI are not at issue here.

In addition to the federal and Law Division actions, Aspen Knolls filed suit against Coast in the Superior Court of New Jersey, Chancery Division ("Chancery Division action") arising from an agreement in which Aspen Knolls provided Coast with a $5,000,000 loan to avoid liquidation and repay its creditors. In the Chancery Division action, the court entered a consent order incorporation an agreement in which Aspen Knolls would acquire Coast's Volkswagen, Audi, and Porsche franchises. Coast provided VOA/AOA with notice of the proposed transfer in accordance with N.J. Stat. Ann. 56:10-6 and the consent order. In response, VOA/AOA filed an order to show cause for a preliminary injunction in the Law Division action to enjoin the sale. On March 3, 2000, the Law Division granted Aspen Knolls leave to intervene and denied VOA/AOA's application for a preliminary injunction.

On May 1, 2000, Aspen Knolls applied for the transfer of the Volkswagen and Audi franchises. On June 29, 2000, VOA/AOA disapproved the applications as deficient and expressed concerns regarding the character of Aspen Knolls' majority member, Robert Mazzuoccola. Coast and Aspen Knolls filed an order to show cause in the Law Divison action seeking to enforce the consent order and compel the transfer of the franchises. After a hearing, the court ordered the parties to continue the application process, and further ordered VOA/AOA to advise Aspen Knolls regarding the application requirements. Following a second application by Aspen Knolls and disapproval by VOA/AOA, the Law Division held a plenary hearing to determine whether VOA/AOA was withholding approval in bad faith. The Law Division judge ultimately concluded that VOA/AOA had unreasona-

bly withheld approval of the transfer and ordered the transfer of the franchise to Aspen Knolls subject to the conditions of the existing franchise agreement. Despite VOA/AOA's pending claims for termination and rescission of the Coast franchise agreement, the Law Division certified the order as final pursuant to N.J.Ct,R. 4:42-2. VOA/AOA timely appealed the decision.

In September 2001, the federal action proceeded to a jury trial on Coast's claims under the Automobile Dealers' Day in Court Act claims and the New Jersey Franchise Practices Act and a bench trial on VOA/AOA's equitable rescission counterclaim. The jury found that VOA/AOA violated the New Jersey Franchise Practices Act and the Automobile Dealers' Day in Court Act in their allocation of vehicles to Coast. However, the jury also concluded by special interrogatories that Coast violated the Franchise Agreement, and that defendants' conduct was not an attempt to coerce or intimidate plaintiff into surrendering or selling the franchise. Thus, damages were not awarded to Coast. The Coast reserved decision as to the rescission claim.

In December 2001, VOA/AOA filed a motion seeking certification of the Court's prior summary judgment order in favor of VOA/AOA and the jury verdict pursuant to Fed.R. Civ. P. 54(b), and a stay of the Law Division's order compelling the transfer of the franchise. On January 4, 2002, prior to the return date on the certification motion, the Superior Court of New Jersey, Appellate Division, published an opinion affirming the Law Division order in all respects. *VW Credit, Inc. v. Coast Automotive Group, Ltd.*, 346 N.J. Super. 326 (App. Div. 2002). The opinion further provided that

"[b]ecause this issue was certified as final pursuant to R. 4:42-2, the pending claims for termination and rescission claims without prejudice.

This Court ordered additional briefing as to the effect of the Appellate Division opinion on the pending motion and the counterclaim. In light of the Appellate Division opinion, VOA/AOA withdrew its motion for certification and a stay on the record on January 18, 2002. The Court now makes the following findings of fact and conclusions of law as to the pending counterclaim pursuant to Fed.R.Civ.P. 52.

B. FINDINGS OF FACT[2]

1. Beginning in 1989, plaintiff, Tamim Shansab, worked as a salesperson for HBL, an automobile dealership located in Northern Virginia, 2T at 154.

2. While at HBL, Shansab developed a relationship with a customer, Daisuke Utagawa, in which Shansab sold cars to Utagawa that were then shipped to Japan for resale. 2T at 104, 154; 4T at 171.

3. In the course of their relationship, Utagawa and Shansab began to contemplate the acquisition of an

---

[2] Reference to the transcripts of trial shall be as follows:

1T Transcript of September 5, 2001
2T Transcript of September 6, 2001
3T Transcript of September 7, 2001
4T Transcript of September 10, 2001
5T Transcript of September 11, 2001
6T Transcript of September 12, 2001

auto dealership in the United States to supply cars to Japan. 2T at 104-105, 155; 4T at 172-173.

4. In 1990, Utagawa, Reizo Utagawa, Kafuhiko Chishiki, and Hiroshi Sugimoto formed a Japanese corporation entitled U.S.C., Inc., through which the principals agreed to provide Shansab with 2.5 million dollars to purchase an automobile agency. By letter agreement dated November 23, 1990, and signed by Shansab, Utagawa, and the principals of U.C.S., Shansab confirmed that "I am proceeding in my negotiations . . . on the basis of the representations made by your principals that the total amount of Two Million Five Hundred Thousand Dollars (US $2,500,000) shall be available to me to purchase either Metropolitan Motorcars . . . or to purchase another agency not yet identified." Def. Exhibit D719.

5. In the letter agreement, Shansab provides that "[a]s per our understanding, I will execute the purchase contract, after consultation with you, in my own name. I will do so solely because of my understanding that the amount named above will be available to me to consummate the purchase for the benefit of you, your principals and myself." *Id.*

6. The letter agreement also states that "[i]t is agreed that beneficial ownership of any agency purchased pursuant to this agreement shall be forty percent held by [Utagawa], ten percent held by U.S.C., and fifty percent held by [Shansab]". *Id.*

7. In addition, the letter agreement further provides that "we have agreed that the acquired business shall pay back to UCS in U.S. dollars the total amounts of One Million, Seven Hundred Thousand Dollars (U.S. $1,700,000) . . . ." *Id.* "Of the total amount of One-Million Seven Hundred Thousand Dollars (U.S. $1,700,000), Nine Hundred Thousand (U.S. $900,000) represents a loan to the business by UCS, and Eight Hundred Thousand (U.S. $800,000) represents a loan to the business for the benefit of Tamin Shansab as further consideration of his role in securing for purchase a (*sic*) suitable agency."*Id.*

8. Pursuant to this agreement, Sugimoto borrowed $2.5 million from Chou Trust and Bank to provide Shansab with the necessary funds to purchase a dealership. 4T at 182. Thereafter, $2.25 million was wired from Japan to the attorney trust account of Shansab's attorney. *Id.* at 154-156.

9. Shansab testified that the acquisition of Metropolitan Motorcars pursuant to the November 23, 1990 letter agreement never came to fruition and that his Japanese friends decided that they were not interested in acquiring a dealership in America. 2T at 105-106. Nevertheless, Shansab testified that they allowed him to keep and use the $2.5 million to acquire a dealership on his own. Shansab and Utagawa described the money essentially as a gift with no obligation to pay back the funds. 4t at 161-162; 174-175. Based upon the various findings that follow and the simple fact that Sugimoto borrowed the funds to provide them to

Shansab and thus, was obligated to repay the loan to Chou Trust, this Court finds that Shansab and Utagawa's testimony that the funds are unencumbered is not credible.

10. In early 1991, the $2.25 million was transferred from the attorney trust account to Tamin Shansab Enterprises, Inc. ("TSE"). 2T at 155-156; 107. Shansab's 1991 Income Tax Return indicates that he operated a sole proprietorship that year under the name of Metropolitan Motor Cars. 2T at 107; Def. Ex. D692. Shansab testified that Metropolitan Motor Cars represented the wholesale purchase of automobiles and resale of those vehicles, including to Shansab's friends in Japan. 4T at 156-158.

11. Also in early 1991, Tamim and Nashir Shansab purchased the Coast dealership from the FDIC and in May of that year, submitted applications to obtain the Volkswagen and Audi franchises. 2T at 46-48; 101-103. The applications provide that Tamim Shansab would invest $1.6. million in the dealership and that Nasir Shansab would invest $400,000 in the dealership. The applications further provide that the $1.6 million an $400,000 were unencumbered and 100% owned by Tamim Shansab and Nasir Shansab respectively. Def. Exs. D8, D11. The signature page on both applications provides that "a]ny material misrepresentation, whether intentional or unintentional, in the information submitted in this application or in connection with this application shall be grounds for immediate termination of any Volkswagen Dealer

Agreement (an "Agreement") which may be granted to Applicant pursuant to this application." *Id.*

12. In addition to the applications, Tamim and Nasir Shansab each submitted a Source of Funds Statement and a Personal Statement of Applicant. In the Source of Funds Statements, Tamim and Nasir Shansab indicate that the $1.6 million and $400,000 to be invested were unencumbered personal funds derived at least in part from the TSE account holding the money from Japan. Def. Exs. D9, D87. Similarly, the Personal Statement of Applicant forms signed by Tamim and Nasir Shanab give no indication that the funds were in any way encumbered. Def. Exs. D10, D88.

13. Tamim Shansab, on behalf of TSE, signed a statement of disclosure providing that if the applicants fail to fully and accurately disclose any other agreements with third parties to World-Wide Volkswagen Corp. "then, and at the option of World-Wide Volkswagen Corp., the said approval of World-Wide Volkswagen Corp., may be withdrawn and the Volkswagen Dealer Agreement shall become null and void, *ab initio* . . . ." Def. Ex. 16.

14. After an investigation, World-Wide Volkswagen Corp. and its Audi division approved the applications in 1991 and Shansab proceeded to operate the franchise. 2T at 114-117.

15. In deposition testimony and, to a lesser extent at trial, Utagawa testified that Tamim Shansab made payments to Sugimoto in Japan by wire transfer to cover

interest due on the $2.5 million loan. Reifsteck Certif., Ex. 16; 4T at 186-187.

16. Nasir Shansab admitted that Tamim sent checks or wire transfers to Japan, but asserted that those payments were made simply to help his friends in Japan with their financial difficulties. 2T at 71-72.

17. Subsequently, Coast filed for protection under Chapter 11 of the Bankruptcy Code.

18. Neither Sugimoto nor any other of the principals of U.C.S. filed a claim in the bankruptcy proceedings. 2T at 131; 4T at 164-165.

19. In January, 1996, after learning that Coast had sought the protection of the Bankruptcy Court, Sugimoto dispatched Hayashi with a letter to be hand-delivered to Tamim Shansab. The letter was delivered to Nasir Shansab in Washington D.C. on January 12, 1996. Due to a severe snow storm on that date, Tamim Shansab was unable to meet Hayashi. 2T at 73-74.

20. Defendants produced an undated letter from Sugimoto to Tamim Shansab which they contend is the letter delivered by Hayashi on January 12, 1996. Def. Ex. D732. Tamim Shansab maintains that the undated letter is from 1991, when they were still considering the Metropolitan Motorcar acquisitions. 2T at 128.

21. The undated letter from Sugimoto specifically makes reference to the November 23, 1990 letter agreement and requests that Tamim Shansab re-confirm the

terms of that agreement. Specifically, the letter provides that the $2.5 million provided to Shansab by UCS constitutes a loan to be re-paid as described in the November 23, 1990 agreement. In addition, the letter includes a signature line for Shansab to re-confirm the terms as set forth. Def. Ex. D732.

22. By letter dated January 12, 1996, Nasir Shansab confirmed receipt of Sugimoto's letter and stated that "[s]ince the letter refers to a legal document drawn up by counsel, Tamim needs to submit it to his attorney before he can *sign* it." Def. Ex. D740 (emphasis added).

23. Also on January 12, 1996, Tamim Shansab sent Kayashi a letter at his hotel in Washington D.C. apologizing for his unavailability due to the weather and confirming that he had been briefed by his father as to Nasir's discussion with Kayashi. Tamim went on to state that "[i]n view of the difficulties Mr. Sugimoto faces, I agree with your suggestion to sell the business – although the present market conditions might not be favorable. I will try to realize a sale as soon as possible, without publically announcing our desire to sell for that could erode the value of the business." Def. Ex. D739.

24. In a letter dated February 27, 1996, Tamim Shansab sought to respond to Sugimoto's concerns. After providing Sugimoto with a lengthy recitation of Coast's problems with VCI and its economic difficulties, Shansab stated, "[w]hen we have moved beyond

the immediate difficulties, I am fully prepared to sit down with Mr. Hayashi, or with you, Daisuke and Mr. Utagawa, and discuss the details of our relationship. Please know in the meantime I will do everything I can to protect you." Def. Ex. D741.

25. In examining the subsequent correspondence, the Court finds that the undated letter was in fact the letter delivered by Hayashi to Nasir Shansab on January 12, 1996. Nasir Shansab's January 12, 1996 letter confirming its receipt demonstrates that the letter refers to a legal document and that it requests Tamim's signature. The first line of the undated letter provides, "Reference is made to the letter agreement dated November 23, 1990 that was executed among you, Mr. Daisuke Utagawa, U.C.S., Inc. and its shareholders including myself in relation to an acquisition of a Mercedes agency in the U.S.A." Def. Ex. D732. In addition, the undated letter also includes a signature line for Tamim Shansab's signature. Finally, considering the substance of the undated letter in sequence with the subsequent correspondence, the letter does not appear out of place chronologically as plaintiff argues.

26. Based upon the foregoing facts, the Court finds by clear and convincing evidence that the $2.5 million provided to Shansab by his Japanese friends was encumbered. Simple common sense dictates that Sugimoto would not incur $2.5 million in debt and simply give that money to Shansab, who he had known for little more than one year, with no strings

attached and no expectation of repayment. It is important to note that Sugimoto borrowed this money, he did not give Shansab $2.5 million in personal funds. The evidence supports this common sense view. First, the letter agreement signed by the parties on November 23, 1990, provides for Shansab to receive a loan of $2.5 million, not a gift. Second, Shansab apparently sent checks or wire transfers to Sugimoto in Japan. Finally, after Coast filed for bankruptcy protection, Sugimoto took the logical step of reaching out to Shansab in an effort to protect his interest and sought to re-confirm the terms of the loan pursuant to the November 23, 1990 agreement.

II. DISCUSSION AND CONCLUSIONS OF LAW

A. RES JUDICATA

A threshold issue for the Court's determination is whether the Appellate Division's decision dismissing the pending rescission claim in the Law Division action as moot requires this Court to dismiss the claim in this action.

"The doctrine of res judicata, or claim preclusion, rests on principles of judicial economy and fairness to litigants." *Oates v. City of Philadelphia*, Civ. No. 98-3329, 1999 WL 1045144, *4 (E.D. Pa. Nov. 17, 1999) (citation omitted). The purpose of the doctrine is to prevent piecemeal litigation of claims arising from the same events. *See Churchill v. Star Enters.*, 183 F.3d 184, 194 (3d Cir.1999). "Where two successive lawsuits seek recovery for the same injury, a judgment on the merits operates as a bar for a later suit, even though a different legal theory of recovery is advanced in the

second suit." *Oates*, 1999 WL 1045144 at *5 (citations and internal quotations omitted).

As to the preclusive effect of a prior state court judgment in federal court, the Full Faith and Credit Act, 28 U.S.C. § 1738,[3] provides that a federal court must accord a state court judgment the same effect as the courts of the state rendering the judgment. See *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367 (1996); *Gregory v. Chehi*, 843 F.2d 111, 116 (3d Cir. 1988); *Suarez v. Camden County Bd. of Chosen Freeholder*, 972 F.Supp. 269 (D.N.J. 1997). "When determining the judgment preclusion effect of a judgment rendered by a state court, we are referred to the law of the rendering the state." *Harris v. Pernsley*, 755 F.2d 338, 342 (3d Cir.), *cert. denied*, 474 U.S. 965 (1985). Therefore, the Court will employ New Jersey law to determine whether a New Jersey state court would conclude that the dismissal of VOA/AOA's rescission claim as moot by the Appellate Division bars consideration of the claim.

As with federal law, New Jersey law provides that res judicata shall apply where: (1) there is a valid, final judgment on the merits by a court of competent jurisdiction; (2) the parties in the subsequent action are identical or in privity with the parties in the prior action; (3) the claim in the sub-

---

3 28 U.S.C. § 1738 provides, in pertinent part:

> The...judicial proceedings of any court of any...State...shall have the same full faith and credit in every court within the United States and its Territories and Possession as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

sequent action arises out of the same transaction or occurrence as the claim in the earlier action. *See Watkins v. Resorts Int'l Hotel and Casino, Inc.*, 124 N.J. 398, 412 (1991); *Nolan v. First Colony Life Ins. Co.*, 345 N.J. Super. 142, 153 (App. Div. 2001).

The parties agree that the sole issue here is whether, under New Jersey law, the Appellate Division's dismissal of VOA/AOA's rescission claim as moot constitutes a final judgment on the merits. Upon examination of the case law, it is clear that a dismissal on grounds of mootness does not constitute a judgment on the merits in New Jersey courts. In *Transamerica Ins. Co. v. Nat'l Roofing Inc.*, the New Jersey Supreme Court held that "[a] dismissal for mootness by definition is not an adjudication on the merits...When a court dismisses a matter as moot, it has found there is nothing to adjudicate." 108 N.J. 59, 64 (1987); *accord Alan J. Cornblatt, P.A. v. Barow*, 153 N.J. 218, 243 (1998) (citing *Transamerica*). There is nothing in the record before the Court which would indicate that the merits of VOA/AOA's claim seeking rescission were considered in any manner by the state court prior to its dismissal, and thus, res judicata is inapplicable.

B. Defendant's Equitable Fraud Counterclaim

1. Liability-New Jersey Law of Equitable Fraud by Misrepresentation

A federal court sitting in diversity or exercising supplemental jurisdiction over state law claims must apply state law including the choice-of-law rules of the forum state, in this case, New Jersey. See *Klaxon Co. v. Stentor Electric*

Mfg. Co., 313 U.S. 487, 495 (1941); *LeJeune v. Bliss-Salem, Inc.*, 85 F.3d 1069, 1071 (3d Cir.1996) (citations omitted); *Fedorczyk v. Carribean Cruise Lines, Ltd.*, 82 F.3d 69, 73 (3d Cir.1996) (citations omitted); *General Ceramics Inc. v. Firemen's Fund Ins. Cos.*, 66 F.3d 647, 652 (3d Cir.1995) (citations omitted). While neither party expressly addresses which state's laws apply to the agreement between the parties but, rather, each appears to presume that New Jersey law applies. Thus, the Court will apply New Jersey law with respect to the defendants' equitable fraud counterclaim seeking rescission.

At the outset, the Court must address plaintiff's claim that, under New Jersey law, a franchise relationship may not be undone by a common law claim seeking rescission. Plaintiff argues that the New Jersey Franchise Practices Act (NJFPA), N.J. Stat. Ann. §§ 56:10-1 to 56:10-15, is the sole vehicle for the termination, cancellation or non-renewal of a franchise in New Jersey. Aside from the fact that plaintiff cites no authority for this proposition, the argument misses the point in this context. Defendants are seeking rescission of the franchise, not termination, cancellation or non-renewal of the franchise. Rescission based on equitable fraud in the formation of an agreement is not synonymous with cancellation, termination or non-renewal of the franchise, and thus, is not governed by those provisions of the NJFPA. See *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279 1296 (Fed. Cir. 1999) *First American Title Ins. Co. v. Lawson*, 351 N.J. Super. 407, 422-23 (App.Div.2002) (noting that "rescission voids the contract *ab initio* [,]" whereas, "'[c]ancellation voids the policy prospectively but would not affect any claim asserted by an innocent third

party prior to cancellation.") (quoting *Progressive Cas. Ins. Co. v. Hanna*, 316 N.J. Super. 63, 71 n.10 (App.Div.1998)), *certif., granted,* 2002 WL 31342495 (N.J. Sep. 6, 2002). There is nothing in the NJFPA which governs rescission of a franchise agreement due to equitable fraud in the formation of the agreement. If plaintiff's argument were accepted, a franchisor would be without remedy against a franchisee who procures a dealership through fraudulent statements in the application so long as, upon receiving the franchise, the franchise continues "to substantially comply with those requirements imposed upon him by the franchise." N.J. Stat. Ann. § 56:10-5. It strains credulity to argue that the New Jersey Legislature intended such an inequitable result. Therefore, the Court concludes that defendants' common law equitable fraud counterclaim is not barred by operation of the NJFPA.

To prevail on a claim of equitable fraud defendants must prove by clear and convincing evidence: "(1) a material misrepresentation of a presently existing or past fact; (2) the maker's intent that the other party rely on it: and (3) detrimental reliance by the other party." *First American Title Ins. Co.*, 351 N.J. Super. At 418 (citing *Jewish Ctr. of Sussex County v. Whale*, 86 N.J. 619, 624-25 (1981); *Liebling v. Garden State Indem.*, 337 N.J. Super. 447, 453 (App.Div.), *certif. denied,* 169 N.J. 606 (2001)). "[U]nlike legal fraud which may give rise to money damages, equitable fraud does not require proof that the representations was made with 'knowledge of its falsity and an intention to obtain an undue advantage therefrom.'" *Daibo v. Kirsch*, 316 N.J. Super. 580, 588 (App. Div. 1998) (quoting *Jewish Ctr. of Sussex County,*

86 N.J. at 625); *accord Lighting Lube v. Witco Corp.*, 4 F.3d 1153, 1182-83 (3d Cir. 1993).

As stated, this Court finds that Tamim and Nasir Shansab misrepresented to VOA/AOA that the $2.5 million they received from their Japanese friends and intended to invest in Coast through TSE was completely unencumbered. There is little doubt that this fact was material to the approval of the franchise applications. Likewise, the very fact and nature of the application indicates that the Shansabs obviously intended that the defendants rely on the information provided and that the defendants did in fact rely on it.

Plaintiff argues, however, that the misrepresentations was immaterial and that defendants did not rely on it because no evidence was produced of other applicants for the franchises, and thus, the applications would have been granted regardless of the misstatement. This argument is unpersuasive. It is apparent that whether an applicants' funds to be invested in the franchise are encumbered is clearly material to the franchisor's decision on the application. To speculate years later as to whether the franchisor would have decided differently had the applicants been entirely truthful is clearly improper at this stage.

In addition, plaintiff appears to argue, relying on the deposition testimony of Cameron Eiseman, that because defendants' investigations failed to identify the false statements about the source of the Shansabs' financing when they were made, those statements must have been true. This argument lacks merit. The fact that defendants were satisfied with plaintiff's applications at the time they were submitted is of

no moment. New Jersey Courts have consistently held that the performance of an investigation in no way vitiates an applicant's obligation to respond truthfully on an application. *See First American Title Ins. Co.*, 351 N.J. Super. at 421-22; *Progressive Cas. Ins. Co.*, 316 N.J. Super. at 70; *see also New Castle County v. Hartford Accident & Indem. Co.*, 685 F.Supp. 1321 (D.Del. 1988), *rev'd in part on other grounds*, 933 F.2d 1162 (3d Cir. 1991).

While the elements of misrepresentations, materiality and reliance are clearly present here, defendants have failed to prove *detrimental* reliance. In other words, defendants have not demonstrated that plaintiff's misrepresentation regarding whether the funds were encumbered caused them to suffer damages.[4] It is undisputed that the money was in Shansab's account and available for, and was used, for investment in the dealership. While the Court has found that plaintiff misrepresented that the money was encumbered, there was no evidence presented that VOA/AOA suffered harm due to the encumbrance. Therefore, the Court concludes that defendants have failed to prove all the requisite elements of equitable fraud.

2. Remedy- New Jersey Law Regarding Rescission

Even if the Court were to conclude that defendants proved equitable fraud on the part of the plaintiff, rescission is not

---

[4] Given the jury verdict in favor of defendants and Coast's sale of the franchise, it appears that defendants continue to seek rescission in an effort to collaterally attack the state court judgment compelling VOA/AOA to transfer the franchise to Aspen Knolls.

an appropriate remedy under the circumstances presented herein. Rescission is a remedy available under New Jersey law where one party to a contract commits fraud or misrepresents material facts during the formation of the contract. *See Merchants Indemnity Corp. v. Eggleston,* 37 N.J. 114, 130-31 (1962). "If a party to a contract is guilty of misrepresentation, the contract is voidable and the victim may rescind the contract." *Cooper v. Borough of Wenonah,* 977 F.Supp. 305, 313 (D.N.J. 1997) (citation omitted). As stated, rescission of the contract results in the "unmaking" of the parties' agreement from the beginning, rather than a mere termination. *See First Hartford Corp., Pension Plan & Trust,* 194 F.3d at 1296 (Fed. Cir. 1999). The decision to grant a remedy of rescission is discretionary, and is to be made only in extraordinary cases where general principles of equity call for it. *See id.* To grant rescission, the Court must ordinarily to be able to return the parties to their pre-contract positions. *See Intertech Assocs., Inc. v. City of Paterson,* 255 N.J. Super. 52, 59 (App. Div. 1992); *Baldasarre v. Butler,* 254 N.J. Super. 502, 524 (App. Div. 1992), *rev'd in part on other grounds,* 132 N.J. 278 (1993); *Hilton Hotels Corp. v. Piper Co.,* 214 N.J. Super. 328, 336 (Ch. Div. 1986) (citing *Driscoll v. Burlington-Bristol Bridge,* 28 N.J. Super. 1, 4 (App. Div. 1953)).

Here, the passage of time and the relationships of the parties have made return to the *status quo ante* and impossibility. More than ten years of a tumultuous franchisor-franchisee relationship have passed between Coast and VOA/AOA. During that time, Coast has filed for an emerged from bankruptcy proceedings, the parties have engaged in

litigation in federal court for at least five years and in state court for at least six years.

Most importantly, Coast has conveyed the franchises to an innocent third party and bonafide purchaser, Aspen Knolls. As recounted in more detail above, VOA/AOA brought a motion in the Law Division to enjoin Coast's sale of the Franchises to Aspen Knolls. The request for an injunction was denied and the Law Division ultimately held that VOA/AOA withheld approval of Aspen Knolls' applications in bad faith and ordered the transfer of the franchise. That determination was affirmed by the Appellate Division. Considering the circumstances, rescission of the franchise agreements would be impossible without nullifying various state court orders and causing substantial injury to an innocent third party. Such a result would be contrary to the principles of equity, and thus, the Court will not exercise its discretion to grant rescission.

Defendants argue that even if restoration of the *status quo* is impossible the Court may nevertheless exercise its equitable powers to fashion in appropriate remedy, particularly through the award of damages.[5] As stated, defendants have failed to prove any identifiable damages as a result of the misrepresentation. Moreover, it is well established under New Jersey law that "[i]n an action for equitable fraud, the only relief that may be obtained is equitable relief, such as rescission or reformation of an agreement and not monetary

---

[5] The intervenor, Aspen Knolls, has also suggested an award of damages as an alternative to rescission, thereby not interfering with their purchase of the dealership.

damages." *Daibo,* 316 N.J. Super. at 591-92 (App. Div. 1998) (quoting *Enright v. Lubow,* 202 N.J. Super. 58, 72 (App. Div. 1985), *certif. denied,*104 N.J. 376 (1986)); *accord Lighting Lube v. Witco Corp.,* 4 F.3d 1153, 1182-83 (3d Cir. 1993). To obtain monetary damages on a fraud claim a party must assert legal fraud, which, as stated, requires proof of scienter. *Jewish Ctr. of Sussex Country,* 86 N.J. at 624-25. Here, defendants have asserted only equitable fraud and have not proven scienter. Thus, the award of monetary damages is inappropriate.

III. CONCLUSION

For the reasons discussed above, the Court hereby enters judgment on the defendants' equitable fraud counterclaim in favor of the plaintiff. An appropriate form of order is filed herewith.

GARRET E. BROWN, JR., U.S.D.J.

(3)

No. 04-1737

Supreme Court, U.S.
FILED
JUL 26 2005
OFFICE OF THE CLERK

In The

Supreme Court of the United States

COAST AUTOMOTIVE GROUP, LTD.,

Petitioner,

v.

VOLKSWAGEN CREDIT, INC., *ET AL.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

MARY ELLEN E. SCHETTER, ESQ.
CAPEHART & SCATCHARD, P.A.
Laurel Corporate Center
8000 Midlantic Drive, Suite 300
Mt. Laurel, NJ 08054
(856) 234-6800

Counsel for Respondents, Volkswagen of America, Inc. and Audi of America

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

The Questions Presented by Petitioner, Coast Automotive Group, Ltd. ("Coast"), should be consolidated and restated as:

1. Whether the lower courts' interpretation of the unambiguous statutory defense provided to franchisors in the New Jersey Franchise Practices Act, N.J. Stat. Ann. 56:10-1, *et seq.* (West 2001) ("NJFPA") was reasonable in light of the statutory language and the policies pursued by the State Legislature in enacting the NJFPA.

2. Whether the decision of the Third Circuit Court of Appeals in favor of the franchisors on the NJFPA claim is inconsistent with the decision of the State Appellate Court in *VW Credit, Inc. v. Coast Automotive Group, et al.*, 787 A.2d 951 (N.J. Super. App. Div.), *cert. denied*, 796 A.2d 895 (N.J. 2002) whereby the court afforded Coast relief under the NJFPA during the pendency of parallel State Court proceedings.

3. Whether compelling reasons have been presented to the Court to justify the review of the sufficiency of the evidence supporting the jury verdicts on the State and Federal statutory claims.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Volkswagen of America, Inc. is a wholly-owned subsidiary of Volkswagen Beteiligungs-Gesellschaft m b h, a corporation organized and existing under the laws of Germany. This latter company is wholly-owned by Volkswagen AG, a German corporation.

Respondent Audi of America is an unincorporated division of Volkswagen of America, Inc.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

STATUTES INVOLVED 1

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 7

REASONS FOR DENYING THE PETITION 8

I. COAST HAS FAILED TO PRESENT ANY SOUND REASON FOR GRANTING THE PETITION BASED UPON THE THIRD CIRCUIT'S INTERPRETATION OF THE UNAMBIGUOUS STATUTORY DEFENSE PROVIDED TO FRANCHISORS IN THE NEW JERSEY FRANCHISE PRACTICES ACT, N.J. STAT. ANN. 56:10-1, *ET SEQ.* (WEST 2001) ("NJFPA") 8

II. THE DECISION OF THE THIRD CIRCUIT IS NOT IN CONFLICT WITH THE DECISION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION IN *VW CREDIT V. COAST*, 787 A.2D 951 (N.J. SUPER. APP. DIV.), *CERT. DENIED*, 796 A.2D 895 (N.J. 2002) WHEREIN THE STATE APPELLATE COURT PERMITTED COAST TO TRANSFER ITS FRANCHISES TO A THIRD PARTY DURING THE PENDENCY OF PARALLEL STATE COURT PROCEEDINGS 16

A. The State Appellate Court's Recognition of Coast as a Franchisee with Rights Under NJFPA Does Not Operate to Eliminate the Statutory Defense Available to Franchisors 17

TABLE OF CONTENTS – Continued

Page

B. The State Appellate Court's Finding in the Context of a Preliminary Injunction That Coast Was Not in Material Breach Does Not Constitute a Final and Binding Adjudication on the Merits 19

III. THE JURY VERDICTS IN FAVOR OF VWOA AND AUDI ON THE TWO STATUTORY CLAIMS ARE SUPPORTED BY THE SUBSTANTIAL AND CREDIBLE WEIGHT OF THE EVIDENCE AND, IN ANY EVENT, NOT OF SUFFICIENT UNIVERSAL IMPORTANCE TO WARRANT REVIEW BY THIS COURT 22

A. Sufficient Evidence Was Presented to Support the Verdict In Favor of VWoA and Audi on the NJFPA Claim 22

B. The Jury's Verdict In Favor of VWoA and Audi on the Dealer's Act Claim Was Supported by Credible Evidence and Not In Error 26

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES:

Amerada Hess Corp. v. Quinn, 362 A.2d 1258 (N.J. Super. Law Div. 1976) 12, 23, 24

American Motors Sales Corp. v. Semke, 384 F.2d 192 (10th Cir. 1967) 28

Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531 (1987) 20

Carlo C. Gelardi v. Miller Brewing Co., 502 F. Supp. 637 (D.N.J. 1980) 14

David R. McGeorge Car Co. v. Leyland Motor Sales, Inc., 504 F.2d 52 (4th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975) 28

Dunkin' Donuts of America, Inc. v. Middletown Donut Corp., 495 A.2d 66 (N.J. 1985) 12, 26

GMC v. New A.C. Chevrolet, Inc., 263 F.3d 296 (3d Cir. 2001) 9

Gregoris Motors v. Nissan Motor Corp., 630 F. Supp. 902 (E.D.N.Y. 1986) 28

Haring v. Prosise, 462 U.S. 306 (1983) 16

Huddleston v. Dwyer, 322 U.S. 232 (1944) 13

In re The Matterhorn Group, Inc., Nos. 97B 41274-97B 41278, 2002 Bankr. Lexis 1275 (Bankr. S.D.N.Y. 11/15/02) 9

McCann v. Clerk of the City of Jersey City, 771 A.2d 1123 (N.J. 2001) 10

TABLE OF AUTHORITIES – Continued

Page

Northview Motors, Inc. v. Chrysler Motors Corp., 227 F.3d 78 (3d Cir. 2000) 27

Salco Corp. v. General Motors Corp., 517 F.2d 567 (10th Cir. 1975) 27

State v. Hoffman, 695 A.2d 236 (N.J. 1997) 10

Velazquez v. Jiminez, 798 A.2d 51 (2002) 10

VW Credit, Inc. v. Coast Automotive Group, Ltd., 787 A.2d 951 (N.J. Super. App. Div.), *cert. denied*, 796 A.2d 895 (N.J. 2002) ..... *passim*

Wade v. Kessler Institute, 798 A.2d 1251 (N.J. 2002) 14

Westfield Centre Service, Inc. v. Cities Service Oil Company, 432 A.2d 48 (N.J. 1981) 11, 18

Zaro Licensing, Inc. v. Cinmar, Inc., 779 F. Supp. 276 (S.D.N.Y. 1991) 9

STATUTES AND RULES

STATE:

N.J. Stat. Ann. 56:10-1, *et seq.* (West 2001) 2, 8

N.J. Stat. Ann. 56:10-5 (West 2001) 13

N.J. Stat. Ann. 56:10-6 (West 2001) 17, 18, 23

N.J. Stat. Ann. 56:10-7(e) (West 2001) 1, 11, 12, 14, 15

N.J. Stat. Ann. 56:10-9 (West 2001) ..... *passim*

N.J. Stat. Ann. 56:10-10 (West 2001) 18, 19

TABLE OF AUTHORITIES – Continued

Page

FEDERAL:

15 U.S.C. §1221, *et seq.* (West 1998) 1, 2

15 U.S.C. §1221(e), *et seq.* (West 1998) 27

15 U.S.C. §1222 (West 1998) 2, 27

Supreme Court Rule 10 22

LEGISLATIVE HISTORY:

Statement accompanying N.J. Assembly Bill 2063 (1971) 11

STATUTES INVOLVED

The following statutes are involved in the opposition to the Petition:

N.J. Stat. Ann. 56:10-7(e) (West 2001)

> It shall be a violation of this act for any franchisor, directly or indirectly, through any officer, agent or employee, to engage in any of the following practices: . . .
>
> e. To impose unreasonable standards of performance upon a franchisee.

N.J. Stat. Ann. 56:10-9 (West 2001)

> It shall be a defense for a franchisor, to any action brought under this act by a franchisee, if it be shown that said franchisee has failed to substantially comply with requirements imposed by the franchise and other agreements ancillary or collateral thereto.

15 U.S.C. §1221(e) (West 1998)

> As used in this Act [15 USCS §§1221 *et seq.*] . . .
>
> e. The term "good faith" shall mean the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: Provided, that recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to be constitute a lack of good faith.

15 U.S.C. §1222 (West 1998)

> Authorization of suits against manufacturers; amount of recovery; defenses.
>
> An automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in any district court of the United States in the district in which said manufacturer resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer from and after the passage of this Act [enacted Aug. 8, 1956] to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer: Provided, that in any such suit the manufacturer shall not be barred from asserting in defense of any such action the failure of the dealer to act in good faith.

STATEMENT OF THE CASE

This Petition arises out of an action by a new motor vehicle dealer, Coast Automotive Group, Ltd. ("Coast") against two of its motor vehicle franchisors, Volkswagen of America, Inc. ("VWoA") and Audi of America ("Audi"), and other defendants. Coast claimed that VWoA and Audi failed to provide sufficient new motor vehicles to it during the course of its bankruptcy proceedings in violation of the New Jersey Franchise Practices Act, N.J. Stat. Ann. 56:10-1, *et seq.* (West 2001) (the "NJFPA") and the Automobile Dealer's Day in Court Act, 15 U.S.C. §1221, *et seq.* (West 1998) (the "Dealer's Act"). A jury trial was conducted by

the Honorable Garrett E. Brown, Jr., U.S.D.J., on the claims by Coast against VWoA and Audi simultaneously with a bench trial on VWoA's and Audi's Counterclaim seeking rescission of Coast's Volkswagen and Audi dealer agreements. At the time of the trial, there were no unresolved claims against any other defendants. In any event, the claims against the other defendants were separate and distinct from the two statutory claims against VWoA and Audi.

The jury returned its verdict in favor of VWoA and Audi on both statutory causes of action. (Appendix to Petition for Writ of Certiorari ("Pet. App.") at 28a-31a.) In connection with the jury verdict in favor of VWoA and Audi on the claim under the NJFPA, the jury determined that although VWoA and Audi violated the Act in their allocation of vehicles to Coast, the respondents proved that Coast failed to substantially comply with the requirements of its franchise. (Pet. App. 30a, verdict sheet questions 5 and 6.) Jury verdict sheet question six was premised on the express language in N.J. Stat. Ann. 56:10-9 (West 2001) which provides a defense to franchisors to claims under the NJFPA where a franchisee fails to substantially comply with its franchise requirements. VWoA and Audi alleged that Coast failed to substantially comply with its franchise agreements in its failure to maintain the required financial accommodations for the purchase of its motor vehicle inventory and in the making of material misrepresentations by the dealer's owners in the applications to be awarded the franchises. (Pet. App. 14a.)

The jury verdict in favor of VWoA and Audi on the claim under the Dealer's Act was entered on the basis of Coast's failure to prove that VWoA's and Audi's "conduct was an attempt to coerce or intimidate plaintiff ("Coast")

into surrendering or selling its Volkswagen and Audi franchises." (Pet. App. 29a, Verdict Sheet Question 2.)

On October 30, 2002, the district court issued an Opinion on the bench portion of the trial. (Supplemental Appendix to Petition for Writ of Certiorari ("Supp. Pet. App.") at 1a-23a.) VWoA and Audi sought rescission of Coast's Dealer Agreements based on material misrepresentations made in the applications to be awarded the agreements in the first instance. The court found by "clear and convincing evidence" that the 2.5 Million Dollars provided to the dealer principal by his Japanese friends was "encumbered" and, thus, there were material misrepresentations made in the applications. (Supp. Pet. App. 13a-14a and 19a-20a). The dealer principals had represented in the applications that the monies to be used to purchase and capitalize Coast were personal (and unencumbered) funds. (Supp. Pet. App. 10a). Notwithstanding the existence of material misrepresentations, the District Court determined that VWoA and Audi were not entitled to rescind the Dealer Agreements due to the failure to prove detrimental reliance. (Supp. Pet. App. 20a). The bench opinion on the counterclaim was not the subject of the appeal to the Third Circuit or the within Petition.

VWoA and Audi rely upon the discussion of the particular facts in this case as stated by the Third Circuit in its Opinion (Pet. App. 7a-8a & 14a-16a) and the District Court Opinion relative to its decision on the Counterclaim. (Supp. Pet. App. 6a-14a.) The following is a brief summary of the facts pertinent to this Court's consideration of the Petition.

Coast had been an authorized retailer of new Volkswagen and Audi motor vehicles at its dealership facilities

in Toms River, New Jersey since 1991. Coast was awarded the Volkswagen and Audi dealer agreements on the basis of the applications which contained material misrepresentations. The written Volkswagen and Audi dealer agreements, which governed the relationship between Coast and Volkswagen and Audi, respectively, required all dealers to maintain compliance with certain financial requirements including the maintenance of separate wholesale lines of credit for the purchase of new vehicles in accordance with established vehicle drafting procedures. The dealer agreements also provided that VWoA and Audi had the right to terminate the agreement if there were material misrepresentations as to any fact relied upon in entering into the agreements.

Coast maintained the required wholesale lines of credit for the purchase of its new motor vehicle inventory until December 1995. At that time, its wholesale (or floor plan) finance company, co-defendant VW Credit, Inc. ("VCI"), terminated its financial arrangements with Coast. VCI filed an action in the Superior Court of New Jersey, Law Division against Coast and the individual and corporate guarantors of Coast's obligations to VCI ("State Court Action"). Coast immediately filed for protection under Chapter 11 of the United States Bankruptcy Code and operated thereunder until September 18, 1997. Coast did not obtain alternate floor plan financing during its bankruptcy proceedings. Because Coast did not have a wholesale line of credit which would provide for timely replacement of the new vehicle inventory, VWoA and Audi representatives had to intervene to get new vehicles assigned to Coast, and then arrange for and confirm payment and shipment on each new vehicle. This process

both delayed and reduced the allocation of new vehicles to Coast. (Pet. App. 7a).

The parallel State Court Action ultimately included a Third-party Complaint against VWoA and Audi. The claims in that action included statutory causes of action under the NJFPA and the Dealer's Act identical to those which were the subject of the jury trial in the federal action in addition to common law causes of action. In 1999, VWoA and Audi sought to terminate Coast's franchises on the basis that it failed to maintain the required wholesale lines of credit for the purchase of new vehicles but the state trial court preliminarily enjoined the termination. In 2000, Coast and the proposed transferee of Coast's Volkswagen and Audi franchises added claims in the State Court Action under the NJFPA and common law against VWoA and Audi in connection with VWoA's and Audi's disapproval of the transfer of the franchises. In June, 2001, over the objection of VWoA and Audi and prior to the trial of all claims pending in the State Court Action, the state trial court entered an Order conditionally approving Aspen Knolls as the franchise transferee of Coast's Volkswagen and Audi franchises. That Order was determined to be final for the purposes of appeal. The Superior Court of New Jersey, Appellate Division, affirmed the Order and issued its Opinion on the appeal of this limited order in *VW Credit, Inc. v. Coast Automotive Group, Ltd.*, 787 A.2d 951 (N.J. Super. App. Div.), *cert. denied*, 796 A.2d 895 (N.J. 2002).

SUMMARY OF THE ARGUMENT

Coast urges this Court to grant its petition to review the decision of the Third Circuit Court of Appeals in affirming the jury verdicts entered in favor of VWoA and Audi on statutory causes of action under the NJFPA and the Dealer's Act.

Coast claims error in allowing the jury to receive instructions and a verdict sheet question on the statutory defense provided to franchisors in the NJFPA. The Court of Appeals for the Third Circuit recognized the unambiguous statutory language in the NJFPA which provides a defense to franchisors in "any action brought under the Act" (NJFPA). No New Jersey state court has construed this statutory language. The interpretation of the plain language of the state statute by the lower federal courts is reasonable in light of the statutory text and the policies that the New Jersey legislature was pursuing in enacting the NJFPA. Further, the statutory language and accompanying legislative history is not reasonably susceptible to the contrived interpretations of the limited applicability of the statute urged by Coast.

Coast also tries to conjure up an inconsistency between the Third Circuit decision and the state appellate court opinion in *VW Credit, Inc. v. Coast Automotive Group, Ltd.*, 787 A.2d 951 (N.J. Super. App. Div.), *cert. denied*, 796 A.2d 895 (N.J. 2002) where none exists. The state appellate court decision recognized Coast's rights as a franchisee under the NJFPA, in particular its right to transfer its franchises to a third party during the pendency of the parallel State Court Action, where a preliminary injunction against termination had issued. There is nothing in the state court decision which either explicitly

discusses or could reasonably be interpreted to eliminate the statutory defense provided under the state statute or otherwise alter the rights of franchisees and franchisors under the NJFPA at a subsequent trial on the merits.

Finally, Coast's position that the jury verdicts on the state and federal statutory claims are against the substantial and credible weight of the evidence is neither supported by the record nor appropriately the subject of a Petition to this Court. The consideration of the sustainability of the jury verdicts would require this court to inquire of the particular facts adduced at the trial in this case. Any such fact-bound review would have little, if any, universal application to other cases.

REASONS FOR DENYING THE PETITION

I. COAST HAS FAILED TO PRESENT ANY SOUND REASON FOR GRANTING THE PETITION BASED UPON THE THIRD CIRCUIT'S INTERPRETATION OF THE UNAMBIGUOUS STATUTORY DEFENSE PROVIDED TO FRANCHISORS IN THE NEW JERSEY FRANCHISE PRACTICES ACT, N.J. STAT. ANN. 56:10-1, *ET SEQ.* (WEST 2001) ("NJFPA").

Through its Petition, Coast complains of legal error in the jury instructions and verdict sheet question which were based upon the express defense provided to franchisors to "any action" brought against a franchisor under the NJFPA by its franchisee. (Pet. at 13-18, Legal Argument II.) VWoA and Audi submit that the lower federal courts appropriately sanctioned the plain meaning of the terms employed by the State Legislature in providing franchisors with a complete defense to any action under the NJFPA

where the complaining franchisee is not in substantial compliance with its franchise obligations. *See*, N.J. Stat. Ann. 56:10-9 (West 2001).

Coast alleged a violation of the NJFPA by VWoA and Audi in connection with the allocation of motor vehicles to Coast's dealership during its bankruptcy proceedings. (Pet. App. 30a Jury Verdict Sheet Question 5.) Although the jury determined that VWoA and Audi violated the NJFPA in the allocation of vehicles to Coast, it denied Coast the right to recover under the NJFPA on the basis of VWoA's and Audi's proof that Coast failed to substantially comply with its requirements under the franchise agreement. (Pet. App. 30a.) Thus, Coast's claim under the NJFPA was defeated on the basis of the statutory defense provided to franchisors in N.J. Stat. Ann. 56:10-9 (West 2001). (Pet. App. 30a, Verdict Sheet Question 6.) That section provides:

> It shall be a defense for a franchisor, to any action brought under this act by a franchisee, if it can be shown that said franchisee has failed to substantially comply with requirements imposed by the franchise and other agreements ancillary or collateral thereto.

As stated in its opinion in this case, the Third Circuit Court of Appeals and federal District Courts had previously recognized that N.J. Stat. Ann. 56:10-9 (West 2001) serves as a complete defense to actions under the NJFPA. *See*, Pet. App. 13a, citing *GMC v. New A.C. Chevrolet, Inc.*, 263 F.3d 296, 321, n.11 (3d Cir. 2001); *In re The Matterhorn Group, Inc.*, Nos. 97B 41274-97B 41278, 2002 Bankr. Lexis 1275 (Bankr. S.D.N.Y. 11/15/02); *Zaro Licensing, Inc. v. Cinmar, Inc.*, 779 F. Supp. 276, 286 (S.D.N.Y. 1991). The Third Circuit further acknowledged, however, that there are no New Jersey state court cases which involve the

application of the statutory defense to affirmative claims by a franchisee under the NJFPA. (Pet. App. 11a.) Although more fully addressed in Section II below, Coast's suggestion that the availability of the statutory defense in this case is inconsistent with the New Jersey Appellate Division in *VW Credit, Inc. v. Coast Automotive Group, et als.*, 787 A.2d 951 (N.J. Super. App. Div.), *cert. denied*, 796 A.2d 895 (N.J. 2002), is seriously misleading since there is no mention of N.J. Stat. Ann. 56:10-9 (West 2001) in that case.

In the absence of controlling state law precedent, the District Court (and the Third Circuit) in this case gave the terms in the New Jersey statute their normal meaning and, accordingly, allowed the jury to be instructed on the availability of the defense to the claims under the NJFPA. As such, considering the state statutory language, the Third Circuit noted that:

> New Jersey abides by well-known rules of statutory construction. In New Jersey, when a statute is clear and unambiguous on its face, 'the sole function of the courts is to enforce it according to its terms.' *Velazquez v. Jiminez*, 798 A.2d 51, 61 (2002). 'All terms in the statute should be accorded their normal sense and significance.' *Id.* The 'overriding objective in determining the meaning of the statute is to effectuate the legislative intent in light of the language used and the objective sought to be achieved.' *McCann v. Clerk of the City of Jersey City*, 771 A.2d 1123, 1128 (N.J. 2001) (quoting *State v. Hoffman*, 695 A.2d 236, 243 (N.J. 1997)). . . .
>
> Giving these terms their normal meaning, as we must, we find no support for Coast's contention that the statutory defense does not apply to actions

> brought under Section 56:10-7(e). To the contrary, Section 56:10-9 provides a complete defense to a franchisor in 'any action' brought under the NJFPA where the franchisee has itself committed a material breach of the franchise agreement. (Pet. App. 11a-12a.)

In its analysis, the Third Circuit noted that the "plain meaning of 56:10-9 is consistent with the NJFPA's stated legislative policy of regulating the responsibilities of both the franchisee and the franchisor." (Pet. App. 12a.) The legislative statement accompanying the bill in the New Jersey Assembly acknowledged that other States had adopted legislation defining the protections afforded both parties to a franchise agreement and further indicated:

> New Jersey would do the same in this bill which, through the courts, would rule out arbitrary and capricious cancellation of franchises while preserving the right of franchisors to safeguard their interests through the application of clear and nondiscriminatory standards . . .

See, Westfield Centre Service, Inc. v. Cities Service Oil Company, 432 A.2d 48, 54 (N.J. 1981) (citing Statement Accompanying Assembly Bill 2063 (1971)).

In discussing the various state legislation concerning franchise relationships, the Supreme Court of New Jersey recognized:

> . . . the limited reach of such statutes. These laws are designed to provide relief only to innocent franchisees, those who had complied with the terms of their franchise agreement but nonetheless were victimized by the loss of their franchises.

See, Dunkin' Donuts of America, Inc. v. Middletown Donut Corp., 495 A.2d 66, 71 (N.J. 1985).[1] In that case, the New Jersey's highest court went on to acknowledge that "the statute, however, is not designed to protect those franchisees who willfully violate the terms of their agreements." *Id.*, 495 A.2d at 72, citing *Amerada Hess Corp. v. Quinn*, 362 A.2d 1258 (N.J. Super. Law Div. 1976). Thus, the New Jersey courts have recognized that an affirmative cause of action does not exist for the benefit of a franchisee where the franchisee itself is in breach of its obligation. In light of the express statutory language utilized in N.J. Stat. Ann. 56:10-9 (West 2001) and the statements of the New Jersey Supreme Court in other cases, it is reasonable to conclude that a franchisee's substantial non-compliance is a defense to a franchisor.

Irrespective of these compelling reasons for sanctioning the interpretation of the statutory language afforded by the lower federal courts in this case, Coast contends in its Petition (as it did below) that the defense should not apply in this case. Coast essentially argues that the defense (1) is not applicable to "non-termination" cases (such as its claim under N.J. Stat. Ann. 56:10-7(e) (West 2001)) and (2) must bear a factual relationship to the franchisee's affirmative claims against the franchisor. (*See* Pet. at pp. 16-17.) Given the absence of New Jersey state court cases addressing the application and scope of N.J. Stat. Ann. 56:10-9 (West 2001), Coast cannot cite state law

[1] Coast's complaint that the Third Circuit misconstrued the concept of "innocent franchisee" is without merit. (*See* Pet. at p.12.) Clearly the New Jersey Supreme Court recognized the term as appropriate for franchisees who had not complied with their obligations under the franchise agreements.

precedent for these arguments. VWoA and Audi maintain that the Third Circuit's disposition of the issue concerning the statutory defense being reasonable, this Court's consideration of the issue should end here. *See*, *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944) ("ordinarily we accept and therefore do not review, save in exceptional circumstances, the considered determination of questions of state law by the intermediate federal appellate courts."). For the purpose of completeness, however, VWoA and Audi will explore the arguments further.

Coast is correct in its indication that the citations by the Third Circuit in its decision are to cases dealing with terminations of a franchise. (*See* Pet. at 11.) It is significant to note that the language in Section 56:10-5, the "termination" provision in the NJFPA, mirrors the language in the statutory defense provision of the statute, Section 56:10-9. Pursuant to N.J. Stat. Ann. 56:10-5 (West 2001), a franchisor may lawfully (*i.e.* not in violation of the NJFPA) terminate a franchisee for "good cause" which is defined as the failure by the franchisee to substantially comply with the requirements imposed by the franchise. Given that the definition of "good cause" for termination is identical to the language utilized by the Legislature to describe the defense provided to franchisors in Section 56:10-9, it would be unnecessary to include Section 56:10-9 if its application was limited to cases involving the "termination" of franchises. Further, the language in Section 56:10-9 that "it shall be a defense for a franchisor to *any action* brought under this act . . . " anticipates a broader application than a defense to a termination case as there are other bases for claims against a franchisor under the NJFPA.

In alleging that VWoA and Audi unfairly allocated vehicles to it during its bankruptcy proceeding, Coast's particular NJFPA claim was couched under the act's prohibition against the imposition of unreasonable standards of performance which is proscribed in N.J. Stat. Ann. 56:10-7(e) (West 2001). As stated by Coast, a New Jersey District Court decision indicates that Section 56:10-7(e) "can be read as a codification of a franchisor's responsibility to comply with the covenant of good faith and fair dealing." (*See* Pet. at 14, citing *Carlo C. Gelardi v. Miller Brewing Co.*, 502 F. Supp. 637, 653 (D.N.J. 1980)). Coast asserts that the obligation to perform a contract in good faith is inconsistent with the statutory defense and the attendant jury instructions and verdict sheet question. (*See* Pet. at 14-16.) Again, there is no precise New Jersey case dealing with this issue. However, it is not disputed that the district court gave the jury accurate instructions relative to the duty of good faith and fair dealing in addition to identifying the specific contract provisions which relate to both Coast's affirmative claim and VWoA's and Audi's defenses. Further, the New Jersey Supreme Court has addressed the appropriateness of a verdict sheet question involving the application of the implied duty of good faith and fair dealing to the alleged breach of a literal term of a contract. *See*, *Wade v. Kessler Institute*, 798 A.2d 1251, 1262 (N.J. 2002). The court concluded that the two claims reflected "one and the same alleged breach." *Id.* In that case, the court determined that the issue of the implied covenant should not have been included in a separate interrogatory to the jury as the jury should have resolved the question of whether there was a breach of a contract provision as "a literal term" not a violation of the implied covenant. *See*, *id.*

The Third Circuit was not persuaded by the argument that Section 56:10-9 is inconsistent with the duty of good faith and fair dealing and a cause of action under 56:10-7(e). (Pet. App. 13a.). It recognized that the defense does not circumvent the State Legislature's intended purpose in enacting the NJFPA to protect innocent (non-breaching) franchises. (Pet. App. 13a.)

Coast also suggests that the lower courts committed error in their failure to require "a factual relationship between Coast's affirmative allocation claim decided in Coast's favor and the purported substantial noncompliance alleged by VWoA and Audi as a defense to that affirmative claim." (Pet. at 16.) Clearly, the New Jersey Legislature did not include such additional terms or conditions in the NJFPA and Coast points to no basis in the legislative history or case law for the same. The addition of conditions to the availability of a defense is not consistent with the legislative policies of defining the rights and responsibility of both parties to the franchise agreement and providing relief to franchisees not in breach of their obligations.

For all of these reasons, VWoA and Audi submit that the Third Circuit (and the Federal District Court) soundly and reasonably addressed the state law statutory interpretation issue raised by Coast in its Petition. The unambiguous language employed by the New Jersey Legislature in granting a defense to franchisors to actions against them under the NJFPA was enforced by the lower federal courts as written. The limiting conditions sought to be imposed by Coast are more appropriately addressed in the form of a State legislative amendment. In the absence of an articulated extraordinary basis for reviewing the lower court's application of state law, VWoA and Audi submit that it is

appropriate to deny Coast's Petition for Certiorari on this basis. *See*, *Haring v. Prosise*, 462 U.S. 306, 314, n.8 (1983).

II. THE DECISION OF THE THIRD CIRCUIT IS NOT IN CONFLICT WITH THE DECISION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION IN *VW CREDIT V. COAST*, 787 A.2D 951 (N.J. SUPER. APP. DIV.), *CERT. DENIED*, 796 A.2D 895 (N.J. 2002) WHEREIN THE STATE APPELLATE COURT PERMITTED COAST TO TRANSFER ITS FRANCHISES TO A THIRD PARTY DURING THE PENDENCY OF PARALLEL STATE COURT PROCEEDINGS.

In legal arguments I and III of its Petition, Coast argues that the Third Circuit improperly disregarded the precedent of *VW Credit, Inc. v. Coast*, *supra*, in which the state appellate court afforded Coast relief under the NJFPA. Coast seriously mischaracterizes the issues presented to the state appellate court and the legal effect of the decision. Coast attempts to provide a basis for this Court to grant its Petition for the purpose of correcting an alleged conflict between a state appellate decision and that of the Third Circuit where none exists.

In the parallel State Court Action, the trial court had preliminarily enjoined the termination of Coast's Volkswagen and Audi franchises. The state trial court subsequently determined that Coast had the right under the NJFPA to transfer its franchises to a third party and that VWoA and Audi unreasonably withheld their approval to the proposed transfer. The order conditionally approving the transfer was declared final and was appealed prior to a trial on the merits of all claims by and between Coast and VWoA and Audi. On appeal, the Superior Court of New

Jersey, Appellate Division, rendered the subject decision on the "primary issue" concerning "the refusal of a franchisor to consent to the franchisee's transfer of the franchises, N.J. Stat. Ann. 56:10-6 (West 2001), and the consequences when that consent is found by a court to be unreasonably withheld." *VW Credit, Inc. v. Coast*, 787 A.2d at 953 (N.J. Super. App. Div.). The Appellate Division concluded that the NJFPA, in particular, N.J. Stat. Ann. 56:10-6 (West 2001), contemplates that the remedy of specific performance is available to compel the transfer. *See, id.*

A. The State Appellate Court's Recognition of Coast as a Franchisee with Rights Under NJFPA Does Not Operate to Eliminate the Statutory Defense Available to Franchisors.

It is not reasonable to extrapolate the unavailability of the statutory defense to VWoA and Audi based upon the state appellate court's recognition of Coast's rights as a franchisee under the NJFPA. For the purpose of this Court's consideration of the within Petition, it must be emphasized that the decision did not include any reference to the statutory defense set forth in N.J. Stat. Ann. 56:10-9 (West 2001). Further, the decision was rendered prior to a final determination on the merits of VWoA's and Audi's defense to the claims against them under the NJFPA that Coast had failed to substantially comply with its obligations under the franchise agreement. It was in this context that the state appellate court recognized Coast's rights under the NJFPA and concluded:

> Under the circumstances, the preliminary injunction entered was appropriate, reasonable, and within the authority of the court to issue.

> *Westfield Centre Service, Inc. v. Cities Service Oil Co.*, 86 N.J. 453, 466-67, 432 A.2d 48 (1981) (trial court may issue temporary injunctive relief or restraints (1) to maintain the status quo during litigation, (2) to provide a franchisee with some additional time to wind up or move its business, or (3) for any other equitable purpose).
>
> The termination having been enjoined, Coast remained the franchisee with all of its rights governed by the Act, including the right to transfer under Section 6 of the Act.

VW Credit v. Coast, supra, 787 A.2d at 957. Contrary to the implication in Coast's Petition, the state appellate court's recognition of Coast as a franchisee with the right to transfer its franchises under the NJFPA does not translate into the unavailability of the statutory defense to franchisors at the time of a final adjudication on the merits of a claim under the state statute.

The state appellate decision dealt with a very restricted topic – the right of a franchisee to transfer its franchises and the appropriate remedy where a franchisor unreasonably withholds consent to the franchise. VWoA and Audi had argued that specific performance (or an order approving a franchise transfer) was not appropriate but that damages (under N.J. Stat. Ann. 56:10-10 (West 2001)) would be appropriate for any violation relative to the withholding of consent. The Appellate Division concluded to the contrary, however, and applied the general principle of statutory construction that "when two statutes conflict, the more specific controls over the more general." *Id.*, 787 A.2d at 961. Specifically, the court concluded that the "particular statutory provisions of Section 6 (56:10-6) requiring specific performance for a violation of that

section, trump the general provisions of damages available under Section 10 (56:10-10)." *Id.* The court reasoned that such reading would effectuate the legislative intent as "Section 6 contemplates the transfer and continuation of the franchise . . . " and a "damage award would not accomplish that objective." *Id.* The state appellate decision has no impact on the Third Circuit's analysis of the availability of the statutory defense to a franchisee's subsequent claim for damages on a separate cause of action for an alleged violation of the NJFPA.

B. The State Appellate Court's Finding in the Context of a Preliminary Injunction That Coast Was Not in Material Breach Does Not Constitute a Final and Binding Adjudication on the Merits.

Coast also takes the position that the state appellate court held "as a matter of law" that "Coast's buying cars with the equivalent of C.O.D. is not a material breach of its obligation" and, thus, one (of the two) basis for VWoA's and Audi's defense to the NJFPA claim was not properly presented to the jury. (*See* Pet. at 18.) This position represents a blatant misstatement of the state appellate decision. VWoA and Audi had sought to terminate Coast's franchises in 1999 on the basis of its failure to maintain the required wholesale lines of credit for the purchase of new motor vehicle inventory but the state court *preliminarily* enjoined the termination attempt. In the *VW Credit v. Coast* case, the Appellate Division acknowledged the validity of the trial court's grant of a preliminary injunction against termination during the pendency of the state court proceedings. In doing so, the appellate court noted:

> This is not a case where a franchisee was in substantial breach of its obligations under the franchise agreements, *which would prohibit a preliminary injunction against termination. See, VW Credit v. Coast*, 787 A.2d at 957. (Citations omitted.) (Emphasis added.)

In making the argument to this Court regarding the legal effect of the state appellate court's determination that Coast's method of paying for motor vehicles was not a substantial breach, Coast omits the complete statement by the appellate court as set forth above. The court clearly indicates that the determination was made in accordance with the standards for granting a preliminary injunction. As this Court is aware, the standards for granting a preliminary injunction include a showing that Coast demonstrated a reasonable probability (or likelihood) of eventual success on the merits of its claim that it was in substantial compliance with its obligations under the franchise agreements. *See, id.* 787 A.2d at 956. This is not identical to a final determination or actual success on the merits. *See, Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531 (1987). The Third Circuit accepted this fundamental principle in stating that the court agreed:

> with VOA/AOA that the *New Jersey Superior Court's statement in the context of a preliminary injunction proceeding has no bearing on the facts adduced at trial on this case* and we find that there is sufficient evidence supporting VOA/AOA's theory that Coast breached the franchise agreement by failing to maintain an adequate floor plan for purchasing new vehicles. (Emphasis added.)

(Pet. App. at 14a-15a.)

VWoA and Audi maintain that there is no sound legal basis for Coast's further statement that "until the Appellate Division or Supreme Court changes or modifies the holding in the *VW Credit v. Coast* (state court) appeal, buying motor vehicles on C.O.D. or its equivalent is substantially compliant" outside of the context of a preliminary injunction. (*See* Pet. at 19.) That being true, VWoA and Audi dispute any legal error in the Third Circuit decision affirming the portion of the jury verdict that Coast failed to substantially comply with its franchise obligations based on an alleged conflict with the state appellate court decision.

In any event, as discussed briefly in Section III below, VWoA and Audi relied upon two separate factual bases in their defense of the NJFPA claim. In addition to the allegation that Coast was not in compliance with its franchise agreements by failing to maintain the required wholesale lines of credit, VWoA and Audi also alleged that Coast made material misrepresentations in the applications submitted to become a Volkswagen and Audi dealer in the first instance. In the bench opinion, the District Court determined that Coast made material misrepresentations in the applications. (Supp. Pet. App. 19a.) Either of these factual bases for VWoA's and Audi's defense is sufficient to support the jury verdict. (Pet. App. 14a.)

III. THE JURY VERDICTS IN FAVOR OF VWOA AND AUDI ON THE TWO STATUTORY CLAIMS ARE SUPPORTED BY THE SUBSTANTIAL AND CREDIBLE WEIGHT OF THE EVIDENCE AND, IN ANY EVENT, NOT OF SUFFICIENT UNIVERSAL IMPORTANCE TO WARRANT REVIEW BY THIS COURT.

Through arguments IV and V of its Petition, Coast submits that the jury's verdict on the two statutory claims is against a substantial and credible weight of the evidence. A petition for a writ of certiorari will only be granted for compelling reasons. Supreme Court Rule 10. Where the "asserted error consists of erroneous factual findings" a petition is rarely granted. *Id.* Coast has not presented any compelling reason for this Court to exercise its discretionary jurisdiction. Indeed, the sufficiency of the evidence presented to the jury on both statutory claims was squarely addressed and affirmed by the Third Circuit.

A. Sufficient Evidence Was Presented to Support the Verdict In Favor of VWoA and Audi on the NJFPA Claim.

In argument IV of its Petition, Coast asserts that the jury's determination that Coast was not in substantial compliance with its obligations under the Volkswagen and Audi franchise agreements was erroneous. This is the Verdict Sheet Question which addresses the statutory defense provided to franchisors in N.J. Stat. Ann. 56:10-9 (West 2001) and discussed in argument I hereof. (Pet. App. 30a, Verdict Sheet Question 6.) At trial, VWoA and Audi contended that Coast failed to substantially comply with its obligations on two separate bases. First, Coast failed to maintain the financial accommodations for the purchase of

new vehicles (i.e. floor plan or wholesale financing). Secondly, VWoA and Audi alleged that Coast made material misrepresentations in the applications to be awarded the Volkswagen and Audi franchise agreements in the first instance. "Jury question 6 did not require the jury to specify which one of the two bases for the defense they relied on." (Pet. App. 14a.) The Third Circuit noted that they (jury) "need only find the evidence sufficient as to one of the proffered bases." *Id.*

"Substantiality" of compliance with one's franchise obligations is not defined in the NJFPA. As correctly noted by Coast, mere technical defects or omissions by a franchisee are insufficient. (Pet. App. at 22.) The Third Circuit agreed with the position of VWoA and Audi that guidance for determining the "substantiality" of the franchise requirements can be gleaned from N.J. Stat. Ann. 56:10-6 (West 2001), the section which addresses applications for transfers of a franchise. (Pet. App. 14a-15a.)

> Under Section 56:10-6, a franchisor may reject a dealership's application to transfer a franchise based on lack of financial ability of the prospective transferee. As in transfer of dealership cases, the prospective franchisee's financial ability is a key factor in the franchisor's decision to grant a dealership in the first instance. Insuring that a prospective dealer has the necessary financial resources to make the franchise succeed ultimately protects the trade name, image, and good will of the franchisor. *See*, *Amerada Hess Corp. v. Quinn*, 362 A.2d 1258, 1266, N.J. Super. Law Div. 1976) (defining substantiality of noncompliance in terms of its effect or potential effect on the franchisor's trademark, trade name, image, and good will).

(Pet. App. 15a.) As further indicated in the *Amerada Hess Corp.* case,

> A franchisor has interest in a particular franchisee's performance broader than the mere protection and enhancement of its trade name, trademark and the good will attached thereto. . . . The franchisor also has an interest in the marketing of its products . . . through the franchise, and a franchisee's breach of his reasonable obligations thereunder, proved to have adversely impacted the volume of the franchisor's goods sold through the franchisee, would substantially impair that interest so as to justify termination.

Id., 362 A.2d at 1266. Clearly, insufficient financial resources have an impact on the volume of a franchisor's goods sold and ultimately negatively impact upon a franchisor. Both grounds for VWoA's and Audi's defense involve the financial requirements for all Volkswagen and Audi dealers. VWoA and Audi rely upon the brief discussion of the particular facts in this case as stated by the Third Circuit in its Opinion (Pet. App. 7a-8a & 14a-16a) and the District Court Opinion relative to its decision on the Counterclaim. (Supp. Pet. App. 6a-14a.)

The Third Circuit concluded that there was sufficient evidence that Coast breached the franchise agreement by failing to maintain an adequate floor plan for purchasing new vehicles. (Pet. App. 15a.) The Third Circuit recognized that:

> Because Coast did not have a wholesale line of credit which would provide for timely replacement of the new vehicle inventory, however, VOA/AOA representatives had to intervene to get more vehicles assigned to Coast, and then arrange

> for and confirm payment and shipment on each new vehicle. This process both delayed and reduced the allocation of new vehicles to Coast.

(Pet. App. 7a.) As discussed in argument II, *supra*, the Court also rejected Coast's contention that the state appellate court's statement concerning the substantiality of Coast's breach for failure to maintain its wholesale line of credit "in the context of a preliminary injunction proceeding" as it had "no bearing on the facts adduced at trial in this case." (Pet. App. 14a-15a.)

In the alternative, the Third Circuit also concluded that "the evidence is sufficient to support the verdict based on Coast's substantial noncompliance in materially misrepresenting its financial ability in the dealer applications." (Pet. App. 15a.) In its Petition, Coast contends that the misrepresentations are a technical breach. (Pet. at 25.) VWoA and Audi submit that the express determination by the District Court (in its unappealed bench decision) that Coast made material misrepresentations should not be subject to collateral attack.

Coast further argues that the latter breach would only be relative to the 1991 dealer application and therefore not applicable to the subsequent dealer agreements issued by VWoA and Audi. (Pet. at 25-27.) Coast suggests that the subsequent dealer agreements do not "relate back to Coast's original application" to be appointed a Volkswagen and Audi dealer. Coast ignores a fundamental principle recognized by the Supreme Court of New Jersey that "with the advent of the New Jersey Franchise Practices Act, once a franchise relationship begins, all that a franchisee must do is comply substantially with the terms of the agreement, in return for which he receives the benefit of an 'infinite' franchise – *he cannot be* terminated or *refused*

renewal." Dunkin' Donuts of America, Inc. v. Middletown Donut Corp., supra, 495 A.2d at 76. Thus, renewal of a dealer agreement is virtually guaranteed where a dealer substantially complies with his franchise obligations (unless the franchisor compensates the franchisee for the value of the franchise). Coast suggests that it should be able to make material misrepresentations to obtain its franchise agreement in the first instance and thus gain the benefit of "infinite" franchise so long as the franchisor does not discover the same until after the issuance of any renewal agreement. (*See* Pet. at 25-28.) This argument runs counter to common sense and the goal of the NJFPA to protect "innocent franchisees." *See id.* 495 A.2d at 73.

VWoA and Audi submit that sufficient credible evidence supports the jury's verdict on the NJFPA claim and, in any event, no compelling reason has been cited to warrant grant of the Petition on this basis.

B. The Jury's Verdict In Favor of VWoA and Audi on the Dealer's Act Claim Was Supported by Credible Evidence and Not In Error.

In its final argument in Section V, Coast maintains that the jury's verdict on the Dealer's Act claim was against the weight of the evidence and inconsistent with its determination under the NJFPA. (Pet. at 28-30.) On the Dealer's Act claim, the jury specifically concluded that Coast did not prove that VWoA's and Audi's "conduct was an attempt to coerce or intimidate plaintiff into surrendering or selling its Volkswagen and Audi franchises." (Pet. App. 29a, Verdict Sheet Question 2.)

In support of its position, Coast reiterates the misleading statement that "the jury clearly found that VWoA's and Audi's actions were an attempt to drive Coast out of business." (Pet. at 29.) Upon close inspection of the jury verdict sheet, however, it is clear that the jury was not required to make such a "finding." (Pet. App. 28a-30a.) Coast apparently relies upon a portion of the jury instructions on the NJFPA claim wherein it was recognized that a franchisor is prohibited from attempting to drive a franchisee out of business (Pet. App. 55a). The jury determination under the separate NJFPA claim that VWoA and Audi "violated the NJFPA in their allocation of vehicles to plaintiff" (Pet. App. 30a, Verdict Sheet Question 5) does not equate with a finding under the Dealer's Act that VWoA's and Audi's actions were an attempt to coerce or intimidate Coast into surrendering or selling (its franchises) under the federal Act. The prerequisites for a cause of action under each statute are distinct.

The Dealer's Act ascribes specific meanings to the terms "coercion" and "intimidation". *See*, 15 U.S.C. §1221(e) and §1222 (West 1998). The federal Act does not protect dealers against all unfair practices, but only against those breaches of good faith evidenced by acts of coercion or intimidation. *See*, *Northview Motors, Inc. v. Chrysler Motors Corp.*, 227 F.3d 78, 93 (3d Cir. 2000), citing *Salco Corp. v. General Motors Corp.*, 517 F.2d 567, 573 (10th Cir. 1975). In those cases where a Dealer's Act violation was established and allocation of vehicles was involved, evidence of the requisite intimidation or coercion was present. For example, the receipt of the diminished or wrongful allocation or a refusal to accept orders for certain vehicles in order to force a dealer to comply with a *wrongful* demand may constitute a violation of the Dealer's Act.

See, David R. McGeorge Car Co. v. Leyland Motor Sales, Inc., 504 F.2d 52, 55-56 (4th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975) (evidence showed that dealer which refused to handle a second line of vehicles being sold by the manufacturer suffered a greater reduction in the number of motor vehicles delivered to it in an attempt to compel the dealer to accept the second line of vehicles); *American Motors Sales Corp. v. Semke*, 384 F.2d 192, 197 (10th Cir. 1967) (evidence that manufacturer refused to supply a dealer with vehicles unless the dealer ordered unwanted models); and *Gregoris Motors v. Nissan Motor Corp.*, 630 F. Supp. 902, 912 (E.D.N.Y. 1986) (misallocation and late delivery paired with a demand for extra illegal consideration for popular cars was sufficient to state a cause of action).

These types of coercive or "either or proposition" factors are not present in this case. The only "evidence" of alleged coercion and intimidation cited by Coast is oral testimony of its dealer principal and employees that Volkswagen's representative indicated that Coast was not going to get any more vehicles and that VWoA pressured Coast to sell back its franchises in addition to a Bankruptcy Court Order appointing a Chapter 11 Trustee to liquidate Coast's dealership. In fact, testimony was presented by the VWoA representative that he never threatened or coerced Coast to sell or surrender its franchise. Additionally, VWoA and Audi were not involved in the entry of the Bankruptcy Court Order requiring liquidation. The Third Circuit recognized that "although Coast asserts that it was VWoA and Audi that pressured it into selling its franchise, Coast represented in bankruptcy proceedings that *its inability* to maintain adequate floor plan financing caused it to conclude that it had to sell the

dealership." (Pet. App. 16a-17a.) VWoA and Audi submit that sufficient credible evidence supports the jury's verdict on the Dealer's Act claim and, in any event, Coast has cited no compelling reason to warrant review of the factual findings by this Court.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied in its entirety.

Respectfully submitted,

MARY ELLEN E. SCHETTER
Counsel of Record
CAPEHART & SCATCHARD, P.A.
8000 Midlantic Drive, Suite 300
Mt. Laurel, NJ 08054
(856) 234-6800
Counsel for Respondents, Volkswagen of America, Inc. and Audi of America

DATED: July 26, 2005